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# Contents

**Federal Register**

Vol. 70, No. 188

Thursday, September 29, 2005

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**Separate Parts In This Issue**



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**Reader Aids**

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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## CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

# Rules and Regulations

Federal Register
Vol. 70, No. 188
Thursday, September 29, 2005



## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 50

**RIN 3150–AH35**

## Incorporation by Reference of ASME BPV Code Cases

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its regulations to incorporate by reference NRC Regulatory Guides listing Code Cases published by the American Society of Mechanical Engineers (ASME) which the NRC has reviewed and found to be acceptable for use. These Code Cases provide alternatives to requirements in the ASME Boiler and Pressure Vessel Code (BPV Code) pertaining to construction and inservice inspection of nuclear power plant components. This action updates the incorporation by reference of two regulatory guides that address NRC review and approval of ASME-published Code Cases. Concurrent with this action, the NRC is publishing a notice of the issuance and availability of the final regulatory guides. As a result of these related actions, the Code Cases listed in these regulatory guides are incorporated by reference into the NRC's regulations.

**DATES:** *Effective Date:* October 31, 2005. The incorporation by reference of certain publications listed in the regulation is approved by the Director of the Office of the Federal Register as of October 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Harry S. Tovmassian, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–3092, e-mail *hst@nrc.gov*.

**SUPPLEMENTARY INFORMATION:**

### Background

New editions of the ASME BPV and Operation and Maintenance of Nuclear Power Plants (OM) Codes are issued every three years and addenda to the editions are issued annually. It has been the Commission's policy to update 10 CFR 50.55a to incorporate the ASME Code editions and addenda by reference. Section 50.55a was last amended on October 1, 2004 (69 FR 58804), to incorporate by reference the 2001 Edition of these Codes, up to and including the 2003 Addenda. The ASME also publishes Code Cases for Section III and Section XI quarterly and Code Cases for the OM Code yearly. ASME Code Cases are alternatives to the requirements of the ASME BPV Code and the OM Code. Thus, the incorporation by reference of the regulatory guides (RGs) listing NRC-approved and conditionally approved ASME Code Cases accords the Code Cases the same legal status as the ASME provisions which they replace.

### Discussion

The NRC staff reviews ASME BPV Code Cases,[1] rules upon the acceptability of each Code Case, and publishes its findings in RGs. The RGs are revised periodically as new Code Cases are published by the ASME. On July 8, 2003 (68 FR 40469), the NRC published a final rule which initiated the practice of incorporating by reference in 10 CFR 50.55a the RGs listing acceptable and conditionally acceptable ASME Code Cases. Thus, NRC RG 1.84, Revision 32, Design, Fabrication, and Materials Code Case Acceptability, ASME Secion III; NRC RG 1.147, Revisions 0 through 13, Inservice Inspection Code Case Acceptability, ASME Section XI, Division 1; and NRC RG 1.192, Operation and Maintenance Code Case Acceptability, ASME OM Code were incorporated into NRC's regulations.

This final rule incorporates by reference the latest revisions of the NRC RGs that list acceptable and conditionally acceptable ASME BPV Code Cases. RG 1.84, Revision 33 supersedes Revision 32 which was previously incorporated by reference. The incorporation by reference of Revision 14 to RG 1.147 will supplement Revisions 0 through 13. This final rule adds Revision 14 to the series of RG 1.147 revisions currently incorporated by reference in § 50.55a. Concurrent with this action, the NRC is publishing notices of availability of the final RGs listing acceptable ASME BPV Code Cases.

[1] The NRC staff also reviews OM Code Cases; however, the regulatory guide listing NRC-approved OM Code Cases is not being revised at this time because no new OM Code Cases have been published by the ASME.

### Evaluation of Code Cases

When the NRC evaluates ASME Code Cases to be incorporated by reference in its RGs, it determines which of the new, revised, or reaffirmed Code Cases are acceptable, conditionally acceptable, or unacceptable. When the NRC published the July 8, 2003, rulemaking (68 FR 40469) incorporating by reference RGs 1.84 and 1.147, the regulatory analysis accompanying that action contained a section listing those Code Cases which were deemed acceptable or conditionally acceptable. For those Code Cases found to be conditionally acceptable, a summary of the basis for the limitations or conditions placed on the application of the Code Case was provided. In order to clearly explain NRC's rationale for limitations placed on Code Cases and to enhance public participation in the entire rulemaking process, the NRC has prepared a separate document entitled ''Evaluation of Code Cases in Supplement 12 to the 1998 Edition and Supplement 1 Through Supplement 6 to the 2001 Edition,'' which contains this information. Copies of this document are available to the public as indicated in the ''Availability of Documents'' section of this preamble.

### Resolution of Public Comments

The NRC received one comment letter on the proposed rulemaking. The commenter made observations about Code Cases N–416–3 and N–504–2 in Revision 14 of RG 1.147 that were duplicative of comments that he submitted in response to the notice announcing the availability of the draft guide for comment (69 FR 46597; August 3, 2004). The NRC finds that no change in the rule language is required as a result of these comments. The NRC's resolution of these comments can be found in the ''Response to Public Comments'' document which is available to the public as indicated in

the ''Availability of Documents'' section of this preamble.

**Status of Code Case N–586**

In Revision 13 to NRC RG 1.147, Code Case N–586 entitled, ''Alternative Additional Examination Requirements for Class 1, 2, and 3 Piping, Components, and Supports, Section XI, Division 1,'' was approved with two conditions. The first condition required licensees to perform additional examinations in the event that during a refueling outage they discover indications that exceed Section XI acceptance criteria. Furthermore, should these additional examinations detect other indications that Section XI criteria are exceeded, further examinations must be conducted during the refueling outage. In the proposed Revision 14 of RG 1.147, these conditions were inadvertently removed and Code Case N–586 was listed as acceptable without condition. Since the conditions placed on Code Case N–586 listed in RG 1.147, Revision 13 received no adverse public comment, Revision 14 is incorporated by reference with the same conditions that applied to this Code Case in Revision 13 of this RG. The staff notes that the cognizant ASME Section XI committees have considered the NRC's position vis-a-vis the conditions on this Code Case and have published Code Case N–586–1 which will be formally evaluated by the staff in the next revision of this RG.

**Paragraph-by-Paragraph Discussion**

On August 3, 2004, (69 FR 46596 and 69 FR 46597), the NRC published notices of availability of proposed revisions to RGs 1.84 and 1.147. The NRC has considered the public comments on these RGs and has resolved those comments by modifying the guides, as appropriate, or providing its rationale for not doing so. This rulemaking supersedes the incorporation by reference of RG 1.84, Revision 32 with Revision 33 and incorporates by reference Revision 14 of RG 1.147 to augment previously incorporated Revisions 0 through 13.

*1. Paragraph 50.55a(b)*

In § 50.55a, paragraph (b)(2)(xxi)(C) is removed. The NRC had previously taken issue with the use of Code Case N–323–1 which permitted surface examinations from the accessible side for welded attachments to pressure vessels. Since this Code Case was incorporated in the 1997 Addenda to the 1995 Edition to the ASME BPV Code, the NRC placed a limitation on its use in § 50.55a(b)(2)(xxi)(C) in which it required that Examination Category B–K, Item 10.10, of the 1995 Addenda must be applied when using the 1997 Addenda through the latest Edition and Addenda incorporated in the NRC's regulations. Based on analysis of the configuration of these attachment welds and the environment in which they exist, no degradation mechanism would be expected to lead to failure of these welds. This conclusion has been confirmed by the results of examinations capable of detecting flaws since no degradation has been observed in these welds. The NRC considers that the proposed change in examination to a surface examination from either side of the weld or a volumetric examination of the weld provides an adequate level of defense in depth. Therefore, Code Case N–323–1 has been removed from RG 1.193, which lists Code Cases that the NRC has not generically approved for use, and listed it as unconditionally acceptable in RG 1.147, Revision 14 and the limitations placed on its use in § 50.55a(b)(2)(xxi)(C) have been removed.

Also, in § 50.55a(b), (b)(4), and (b)(5), references to the revision number for RG 1.84 are changed from ''Revision 32'' to ''Revision 33,'' and references to the revision numbers for RG 1.147 are changed from ''through Revision 13'' to ''through Revision 14.'' Revision 33 of RG 1.84 is incorporated by reference in § 50.55a in place of Revision 32. Revision 14 of RG 1.147 is incorporated by reference in § 50.55a in addition to all previous revisions, which are incorporated by reference.

*2. Paragraphs 50.55a(f)(2), (f)(3)(iii)(A), (f)(3)(iv)(A), (f)(4)(ii), (g)(2), (g)(3)(i), (g)(3)(ii), (g)(4)(i), and (g)(4)(ii)*

In these paragraphs, the phrase indicating that revisions of RG 1.147 ''through Revision 13'' are the versions incorporated by reference in § 50.55a(b) is modified to read ''through Revision 14.''

**Availability of Documents**

The NRC is making the documents identified below available to interested persons through one or more of the following:

Public Document Room (PDR). The NRC Public Document Room is located at 11555 Rockville Pike, Public File Area O–1 F21, Rockville, Maryland. Copies of publicly available documents related to this rulemaking can be viewed electronically on public computers in the PDR. The PDR reproduction contractor will make copies of documents for a fee.

Rulemaking Web site. The NRC's interactive rulemaking Web site is located at *http://ruleforum.llnl.gov*. Selected documents may be viewed and downloaded electronically via this Web site. Documents will remain available on the site for six months after the effective date of this rule.

The NRC's Public Electronic Reading Room (PERR). The NRC's public electronic Reading Room is located at *http://www.nrc.gov/reading-rm.html*. Through this site, the public can gain access to ADAMS, which provides text and image files of NRC's public documents.

Reproduction and Distribution Services (DIST). Single copies of NRC Regulatory Guides 1.84, Revision 33; 1.147, Revision 14; and 1.192 may be obtained free of charge by writing the Reproduction and Distribution Services Section, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; or by fax to 301–415–2289; or by e-mail to *DISTRIBUTION@nrc.gov*.

The NRC staff contact (NRC Staff). Single copies of the final rule, the regulatory analysis, the environmental assessment, and the regulatory guides may be obtained from Harry S. Tovmassian, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Alternatively, you may contact Mr. Tovmassian at (301) 415–3092 or via e-mail to: *hst@nrc.gov*.

| Document | PDR | Web | DIST | ERR | NRC staff |
|---|---|---|---|---|---|
| Regulatory Analysis | X | X | ..... | ML043640553 | X |
| Regulatory Guide 1.84, Revision 33 | X | ..... | X | ML052130562 | X |
| Regulatory Guide 1.147, Revision 14 | X | ..... | X | ML052510117 | X |
| Regulatory Guide 1.193, Revision 1 | X | ..... | X | ML052140501 | X |
| Response to Public Comments on Guides | X | X | ..... | ML050940285 | X |
| Evaluation of Code Cases | X | X | ..... | ML050940259 | X |

| Document | PDR | Web | DIST | ERR | NRC staff |
|---|---|---|---|---|---|
| Public Comment Letter | X | X | ..... | ML042960462 | X |

**Voluntary Consensus Standards**

The National Technology Transfer and Advancement Act of 1995, Pub. L. 104–113 (15 U.S.C. 3701 *et seq.*), requires agencies to use technical standards developed or adopted by voluntary consensus standards bodies unless the use of such standards is inconsistent with applicable law or is otherwise impractical. The NRC is amending its regulations to incorporate by reference regulatory guides that list ASME BPV Code Cases which have been approved by the NRC. ASME Code Cases, which are ASME-approved alternatives to the provisions of ASME Code editions and addenda, constitute national consensus standards, as defined in Pub. L. 104–113 and Office of Management and Budget (OMB) Circular A–119. They are developed by bodies whose members (including the NRC and utilities) have broad and varied interests.

The NRC reviews each Section III and Section XI Code Case published by the ASME to ascertain whether its application is consistent with the safe operation of nuclear power plants. Those Code Cases found to be generically acceptable are listed in the RGs which are incorporated by reference in § 50.55a(b). Those that are found to be unacceptable are listed in RG 1.193, entitled Code Cases not Approved for Use; but licensees may still seek NRC's approval to apply these Code Cases through the relief request process permitted in § 50.55a(a)(3). Other Code Cases, which the NRC finds to be conditionally acceptable, are also listed in the RGs which are incorporated by reference along with the modifications and limitations under which they may be applied. If the NRC did not provide for the conditional acceptance of ASME Code Cases, these Code Cases would be disapproved outright. The effect would be that licensees would need to submit a larger number of relief requests which would represent an unnecessary additional burden for both the licensee and the NRC. The NRC believes that this situation fits the definition of ''impractical,'' as it applies to Pub. L. 104–113. For these reasons, The NRC believes that the treatment of ASME BPV Code Cases, and modifications and limitations placed on them, in this final rule does not conflict with any policy on agency use of consensus standards specified in OMB Circular A–119.

**Finding of No Significant Environmental Impact: Availability**

The Commission has determined under the National Environmental Policy Act of 1969, Pub. L. 97–190 (42 U.S.C. 4321 *et seq.*), as amended, and the Commission's regulations in subpart A of 10 CFR part 51, that this rule is not a major Federal action significantly affecting the quality of the human environment, and, therefore, an environmental impact statement is not required. The basis for this determination is that this rulemaking will not significantly increase the probability or consequences of accidents; no changes are being made in the types of effluents that may be released off site; and there is no significant increase in public or occupational radiation exposure. Therefore, there are no significant radiological impacts associated with the action. Also, no significant nonradiological impacts are associated with the action. Thus, the NRC determines that there will be no significant off site impact to the public from this action.

The NRC requested the views of the States on the environmental assessment for the rule and did not receive any comments from the States.

**Paperwork Reduction Act Statement**

This final rule decreases the burden on licensees by allowing the use of alternative Code Cases. There is an estimated industry-wide reduction of 713 hours annually for the anticipated reduction in the number information collections required. Because the burden for this information collection is insignificant, OMB clearance is not required. The existing requirements were approved by OMB, approval number 3150–0011.

**Public Protection Notification**

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

**Regulatory Analysis**

The ASME Code Cases listed in the RGs provide voluntary alternatives to the provisions in the ASME BPV Code and OM Code for construction, ISI, and IST of specific structures, systems, and components used in nuclear power plants. Implementation of these Code Cases is not required. Licensees use NRC-approved ASME Code Cases to reduce regulatory burden or gain additional operational flexibility. It would be difficult for the NRC to provide these advantages independent of the ASME Code Case publication process without a considerable additional resource expenditure by the agency. The NRC has prepared a regulatory analysis addressing the qualitative benefits of the alternatives considered in this rulemaking and comparing the costs associated with each alternative. The regulatory analysis is available to the public as indicated under the ''Availability of Documents'' section of this preamble.

**Regulatory Flexibility Certification**

In accordance with the Regulatory Flexibility Act of 1980, Pub. L. 96–354 (5 U.S.C. 605(b)), the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule affects only the licensing and operation of nuclear power plants. The companies that own these plants do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the size standards established by the NRC (10 CFR 2.810).

**Backfit Analysis**

The provisions in this final rule permit, but do not require, licensees to apply Code Cases that have been reviewed and approved by the NRC, sometimes with modifications or conditions. Therefore, the implementation of an approved Code Case is voluntary and does not constitute a backfit. Thus, the Commission finds that these amendments do not involve any provisions that constitute a backfit as defined in 10 CFR 50.109(a)(1), that the backfit rule does not apply to this final rule, and that a backfit analysis is not required.

**Small Business Regulatory Enforcement Fairness Act**

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a

major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

**List of Subjects in 10 CFR Part 50**

Antitrust, Classified information, Criminal penalties, Fire protection, Incorporation by reference, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 50.

## PART 50—DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

■ 1. The authority citation for Part 50 continues to read as follows:

**Authority:** Secs. 102, 103, 104, 105, 161, 182, 183, 186, 189, 68 Stat. 936, 937, 938, 948, 953, 954, 955, 956, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2201, 2232, 2233, 2236, 2239, 2282); secs. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note).

Section 50.7 also issued under Pub. L. 95–601, sec. 10, 92 Stat. 2951 (42 U.S.C. 5851). Section 50.10 also issued under secs. 101, 185, 68 Stat. 955, as amended (42 U.S.C. 2131, 2235); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under sec. 108, 68 Stat. 939, as amended (42 U.S.C. 2138). Sections 50.23, 50.35, 50.55, and 50.56 also issued under sec. 185, 68 Stat. 955 (42 U.S.C. 2235). Sections 50.33a, 50.55a and appendix Q also issued under sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204, 88 Stat. 1245 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97–415, 96 Stat. 2073 (42 U.S.C. 2239). Section 50.78 also issued under sec. 122, 68 Stat. 939 (42 U.S.C. 2152). Sections 50.80–50.81 also issued under sec. 184, 68 Stat. 954, as amended (42 U.S.C. 2234). Appendix F also issued under sec. 187, 68 Stat. 955 (42 U.S.C. 2237).

■ 2. Section 50.55a is amended by removing paragraph (b)(2)(xxi)(C), revising the introductory text of paragraphs (b), (b)(4), and (b)(5), and paragraphs (f)(2), (f)(3)(iii)(A), (f)(3)(iv)(A), (f)(4)(ii), (g)(2), (g)(3)(i), (g)(3)(ii), (g)(4)(i) and (g)(4)(ii) to read as follows:

**§ 50.55a Codes and standards.**

* * * * *

(b) The ASME Boiler and Pressure Vessel Code and the ASME Code for Operation and Maintenance of Nuclear Power Plants, which are referenced in paragraphs (b)(1), (b)(2), and (b)(3) of this section, were approved for incorporation by reference by the Director of the Office of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. NRC Regulatory Guide 1.84, Revision 33, ''Design, Fabrication, and Materials Code Case Acceptability, ASME Section III'' (August 2005); NRC Regulatory Guide 1.147 (Revision 0-February 1981), including Revision 1 through Revision 14 (August 2005), ''Inservice Inspection Code Case Acceptability, ASME Section XI, Division 1''; and Regulatory Guide 1.192, ''Operation and Maintenance Code Case Acceptability, ASME OM Code'' (June 2003), have been approved for incorporation by reference by the Director of the Office of the Federal Register pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. These regulatory guides list ASME Code cases which the NRC has approved in accordance with the requirements in paragraphs (b)(4), (b)(5), and (b)(6). Copies of the ASME Boiler and Pressure Vessel Code and the ASME Code for Operation and Maintenance of Nuclear Power Plants may be purchased from the American Society of Mechanical Engineers, Three Park Avenue, New York, NY 10016. Single copies of NRC Regulatory Guides 1.84, Revision 33; 1.147, Revision 14; and 1.192 may be obtained free of charge by writing the Reproduction and Distribution Services Section, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; or by fax to 301–415–2289; or by e-mail to *DISTRIBUTION@nrc.gov.* Copies of the ASME Codes and NRC Regulatory Guides incorporated by reference in this section may be inspected at the NRC Technical Library, Two White Flint North, 11545 Rockville Pike, Rockville, MD 20852–2738, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

* * * * *

(4) *Design, Fabrication, and Materials Code Cases.* Licensees may apply the ASME Boiler and Pressure Vessel Code cases listed in NRC Regulatory Guide 1.84, Revision 33, without prior NRC approval subject to the following:

* * * * *

(5) *Inservice Inspection Code Cases.* Licensees may apply the ASME Boiler and Pressure Vessel Code and the ASME Code cases listed in Regulatory Guide 1.147 through Revision 14, without prior NRC approval subject to the following:

* * * * *

(f) * * *

(2) For a boiling or pressurized water-cooled nuclear power facility whose construction permit was issued on or after January 1, 1971, but before July 1, 1974, pumps and valves which are classified as ASME Code Class 1 and Class 2 must be designed and be provided with access to enable the performance of inservice tests for operational readiness set forth in editions and addenda of Section XI of the ASME Boiler and Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, or 1.192 that are incorporated by reference in paragraph (b) of this section) in effect six months before the date of issuance of the construction permit. The pumps and valves may meet the inservice test requirements set forth in subsequent editions of this Code and addenda which are incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, or 1.192 that are incorporated by reference in paragraph (b) of this section), subject to the applicable limitations and modifications listed therein.

(3) * * *

(iii) * * *

(A) Pumps and valves, in facilities whose construction permit was issued before November 22, 1999, which are classified as ASME Code Class 1 must be designed and be provided with access to enable the performance of inservice testing of the pumps and valves for assessing operational readiness set forth in the editions and addenda of Section XI of the ASME Boiler and Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, or 1.192 that are incorporated by reference in paragraph (b) of this section) applied to the construction of the particular pump or valve or the Summer 1973 Addenda, whichever is later.

* * * * *

(iv) * * *

(A) Pumps and valves, in facilities whose construction permit was issued before November 22, 1999, which are classified as ASME Code Class 2 and Class 3 must be designed and be

provided with access to enable the performance of inservice testing of the pumps and valves for assessing operational readiness set forth in the editions and addenda of Section XI of the ASME Boiler and Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section) applied to the construction of the particular pump or valve or the Summer 1973 Addenda, whichever is later.

* * * * *

(4) * * *

(ii) Inservice tests to verify operational readiness of pumps and valves, whose function is required for safety, conducted during successive 120-month intervals must comply with the requirements of the latest edition and addenda of the Code incorporated by reference in paragraph (b) of this section 12 months before the start of the 120-month interval (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, or 1.192 that are incorporated by reference in paragraph (b) of this section), subject to the limitations and modifications listed in paragraph (b) of this section.

* * * * *

(g) * * *

(2) For a boiling or pressurized water-cooled nuclear power facility whose construction permit was issued on or after January 1, 1971, but before July 1, 1974, components (including supports) which are classified as ASME Code Class 1 and Class 2 must be designed and be provided with access to enable the performance of inservice examination of such components (including supports) and must meet the preservice examination requirements set forth in editions and addenda of Section XI of the ASME Boiler and Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section) in effect six months before the date of issuance of the construction permit. The components (including supports) may meet the requirements set forth in subsequent editions and addenda of this Code which are incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section), subject to the applicable limitations and modifications.

(3) * * *

(i) Components (including supports) which are classified as ASME Code Class 1 must be designed and be provided with access to enable the performance of inservice examination of these components and must meet the preservice examination requirements set forth in the editions and addenda of Section XI of the ASME Boiler and Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section) applied to the construction of the particular component.

(ii) Components which are classified as ASME Code Class 2 and Class 3 and supports for components which are classified as ASME Code Class 1, Class 2, and Class 3 must be designed and be provided with access to enable the performance of inservice examination of these components and must meet the preservice examination requirements set forth in the editions and addenda of Section XI of the ASME Boiler and Pressure Vessel Code incorporated by reference in paragraph (b) of this section (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section) applied to the construction of the particular component.

* * * * *

(4) * * *

(i) Inservice examinations of components and system pressure tests conducted during the initial 120-month inspection interval must comply with the requirements in the latest edition and addenda of the Code incorporated by reference in paragraph (b) of this section on the date 12 months before the date of issuance of the operating license (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section), subject to the limitations and modifications listed in paragraph (b) of this section.

(ii) Inservice examination of components and system pressure tests conducted during successive 120-month inspection intervals must comply with the requirements of the latest edition and addenda of the Code incorporated by reference in paragraph (b) of this section 12 months before the start of the 120-month inspection interval (or the optional ASME Code cases listed in NRC Regulatory Guide 1.147, through Revision 14, that are incorporated by reference in paragraph (b) of this section), subject to the limitations and modifications listed in paragraph (b) of this section.

* * * * *

Dated at Rockville, Maryland, this 31st day of August, 2005.

For the Nuclear Regulatory Commission.

**Luis A. Reyes,**

*Executive Director for Operations.*

[FR Doc. 05–19443 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 121 and 125

**RIN 3245–AF38**

### The Very Small Business Program

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Final rule.

**SUMMARY:** The U.S. Small Business Administration (SBA or Agency) is amending its regulations to remove provisions relating to the Very Small Business Program (VSB). The Agency no longer has statutory authority to provide assistance under this program; therefore, the regulations are unnecessary. Without any authority to carry out the program, removal of the applicable regulations is a ministerial act that does not require a comment period.

**DATES:** The rule is effective September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Dean Koppel, Assistant Administrator, Office of Procurement Policy and Liaison, (202) 205–7322 or *Dean.Koppel@sba.gov.*

**SUPPLEMENTARY INFORMATION:** The VSB program was authorized as a pilot program by the Small Business Administration Reauthorization and Amendments Act of 1994 (Act). (See Pub. L. 103–403, Section 304). The purpose of the VSB program was to improve access to Federal contract opportunities for concerns that are substantially below SBA's size standards by reserving certain procurements for competition among very small business concerns. Specifically, under the VSB program, federal agencies with procurement needs valued at $2,500 to $50,000 were required to give small businesses with 15 or fewer employees, average annual revenues of less than $1 million, and that were located in certain designated areas, the first opportunity to meet those

needs. The pilot was originally scheduled to expire in 1998 but was extended until December 8, 2004, through a series of legislative actions. On December 8, 2004, President Bush signed Public Law 108–447, Division K, which included the Small Business Administration Reauthorization and Manufacturing Assistance Act of 2004. This Act gave SBA authorization to continue several programs but did not re-authorize the VSB program. Because SBA no longer has statutory authority to conduct the VSB program, the regulations applicable to the program are no longer necessary and will be removed from the Code of Federal Regulations. Removal of these regulations is an entirely administrative action that will minimize confusion about the status of the VSB program and how agencies are to conduct procurements.

The expiration of the authority to give preference to very small businesses under the VSB program also impacts the Federal Acquisition Regulation (FAR). SBA has notified the Civilian Agency Acquisition Council (Council) as well as the Federal procurement agencies of the expiration of the VSB program and intends to work with the Council to implement the necessary amendments to the FAR.

**Compliance With Executive Orders 12866, 12988, and 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)**

OMB has determined that this final rule does not constitute a ''significant regulatory action'' under Executive Order 12866.

For purposes of the Paperwork Reduction Act, 44 U.S.C. Ch. 35, the SBA determines that this rule does not impose new reporting or recordkeeping requirements.

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

This regulation will not have substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, for the purposes of Executive Order 13132, SBA determines that this final rule has no federalism implications warranting preparation of a federalism assessment.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Within the meaning of RFA, SBA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

**List of Subjects**

*13 CFR Part 121*

Administrative practice and procedures, Government procurement, Government property, Reporting and recordkeeping requirements, Small businesses.

*13 CFR Part 125*

Government contracts, Government procurement, Small businesses, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

■ For the reasons stated in the preamble, the Small Business Administration amends 13 CFR parts 121 and 125 as follows:

## PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for Part 121 is revised to read as follows:

**Authority:** 15 U.S.C. 632(a), (p), (q), 634(b)(6), 637(a), 644, and 662(5); Pub. L. 105–135 sec. 401 *et seq.*

■ 2. Revise § 121.401 to read as follows:

**§ 121.401 What procurement programs are subject to size determinations?**

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, SBA's HUBZone program, SBA's Service-Disabled Veteran-Owned Small Business program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

**§ 121.413 [Removed and Reserved]**

■ 3. Remove and reserve § 121.413.

## PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 4. The authority citation for Part 125 is revised to read as follows:

**Authority:** 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644 and 657(f).

**§ 125.7 [Removed and Reserved]**

■ 5. Amend Part 125 by removing and reserving § 125.7.

■ 6. Revise § 125.13 to read as follows:

**§ 125.13 May 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, or Women-Owned Small Businesses qualify as SDVO SBCs?**

Yes, 8(a) Program participants, HUBZone SBCs, Small and Disadvantaged Businesses, and Women-Owned SBCs, may also qualify as SDVO SBCs if they meet the requirements in this subject.

Dated: September 23, 2005.

**Hector V. Barretto,**

*Administrator.*

[FR Doc. 05–19512 Filed 9–28–05; 8:45 am]

**BILLING CODE 8025–01–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–20796; Directorate Identifier 2004–NM–160–AD; Amendment 39–14299; AD 2005–20–06]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A300 B2 and A300 B4 Series Airplanes; Model A300 B4–600, B4–600R and F4–600R Series Airplanes, and Model A300 C4–605R Variant F Airplanes (Collectively Called A300–600 Series Airplanes); and Model A310–200 and –300 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for all the Airbus models identified above. This AD requires modifying the electrical power supply logic for the integral lighting of the standby horizon indicator in the cockpit, accomplishing repetitive operational tests of the integral lighting logic system, and performing corrective action if necessary. This AD is prompted by a report of temporary loss of six cathode ray tube (CRT) flight displays and the integral lighting of the

standby horizon indicator backlight in the cockpit during takeoff, due to failure of the normal electrical power circuit. That power circuit supplies power to both the CRTs and the standby horizon indicator backlight. We are issuing this AD to prevent loss of the integral lighting due to failure of the normal electrical power circuit, which could result in inability of the pilot to read the backup attitude information during takeoff, and possible deviation from the intended flight path.

**DATES:** This AD becomes effective November 3, 2005.

The incorporation by reference of certain publications listed in the AD is approved by the Director of the Federal Register as of November 3, 2005.

**ADDRESSES:** For service information identified in this AD, contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France.

*Docket:* The AD docket contains the proposed AD, comments, and any final disposition. You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Washington, DC. This docket number is FAA–2005–20796; the directorate identifier for this docket is 2004–NM–160–AD.

**FOR FURTHER INFORMATION CONTACT:** Tim Backman, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:** The FAA proposed to amend 14 CFR part 39 with an AD for all Airbus Model A300 B2 and A300 B4 series airplanes; Model A300 B4–600, B4–600R and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called A300–600 series airplanes); and Model A310 series airplanes. That action, published in the **Federal Register** on April 4, 2005 (70 FR 16981), proposed to require modifying the electrical power supply logic for the integral lighting of the standby horizon indicator in the cockpit, accomplishing repetitive operational tests of the integral lighting logic system, and performing corrective action if necessary.

**Comments**

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been submitted on the NPRM.

**Support for Proposed AD**

One commenter supports the intent and actions specified in the NPRM.

**Request To Revise Service Information/Change Certain Requirements**

One commenter states that it has no objection to the intent of the NPRM—to prevent loss of integral lighting; however, the commenter has several concerns. Each of the commenter's concerns is followed by an FAA response.

1. The NPRM and the referenced French airworthiness directive are based on one operator, one airplane, and one event. The commenter notes that the Airbus solution was to issue the referenced service information, and adds that the reported multiple cathode ray tube (CRT) failure seems to be a mystery. Per the Discussion section in the NPRM, ''The temporary loss of the CRTs is still under investigation.'' However, the referenced service bulletin specifies ''This inspection service bulletin (ISB) recommends checking the standby horizon integral lighting logic supply. Accomplishment of this ISB will avoid the loss of the standby horizon indicator integral lighting.'' The commenter notes that there is no CRT reference in the service bulletin. The commenter would like to see the modification specified in the service bulletins be compatible with the modification required by the NPRM; for this to occur, the service bulletins must be revised to specify if the CRT issue is corrected with the modification.

Airbus has issued the following revised service bulletins (the previous versions were referenced in the NPRM as the appropriate sources of service information for accomplishing certain required actions):

REVISED SERVICE BULLETINS

| For Model— | Service Bulletin date— |
|---|---|
| A300 B2 and A300 B4 series airplanes | A300–31–0077, Revision 01, dated January 28, 2005. |
| A300 B4–600, B4–600R and F4–600R series airplanes; A300 C4–605R Variant F airplanes. | A300–31–6105, Revision 03, dated December 20, 2004.<br>A300–33–6049, Revision 02, dated April 25, 2005. |
| A310 series airplanes | A310–31–2120, Revision 02, dated January 28, 2005; and Revision 03, dated June 22, 2005. |

We have added the revisions above to this final rule as the sources of service information for accomplishing certain actions. These revisions add no further work to the previous issues of the service bulletins; operators are merely informed that the revised service bulletins are mandatory. We have changed paragraph (f) of this AD to add credit for actions done in accordance with the previous issues of the service bulletins.

For clarification, the standby horizon indicator provides backup attitude information to the pilot and is illuminated by integral lighting (a backlight). The purpose of modifying the electrical power supply logic for the integral lighting is to provide automatic switching to a different power circuit if there is a failure of the normal power circuit. This switching will allow the pilot to read attitude information from the standby indicator in low light conditions with a failure of the normal power circuit. The technical content of the referenced service bulletins is correct and contains adequate information and procedures to accomplish the modification of the electrical power supply logic; however, this modification will not correct the temporary loss of the CRTs, which is still under investigation. We have changed the Summary section and paragraph (d) of this AD to add this clarification.

2. The modification of the integral lighting power supply logic of the standby horizon is still not the ultimate ''fix'' since the NPRM requires indefinite repetitive operational tests of

the modification. The commenter argues that the referenced service bulletins were issued by Airbus as a data collection device to verify that the modification fixed the problem. Further explanation of the necessity of the repetitive operational tests, by the FAA or the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, is requested.

We acknowledge the commenter's concern regarding accomplishing repetitive operational tests indefinitely, but we disagree with the comment that the service bulletins were issued by Airbus as a data collection device to verify that the modification fixed the problem. The FAA, DGAC, and Airbus regard the modification of the integral lighting power supply logic of the standby horizon indicator a final fix to ensure adequate lighting. During operation under normal electrical power, background lighting of the stand-by attitude is supplied through a specific power circuit. However, the modification provides automatic switching to a different power circuit if there is a failure of the normal power circuit. This feature is hidden as long as the normal power circuit is operating. Consequently, to limit the exposure time of a hidden failure of the automatic switching feature to meet safety objectives, a periodic operational test is required.

3. The NPRM requires indefinite repetitive operational tests of the modification at 600-flight-hour intervals. The commenter has an established B-check maintenance schedule of 350 flight hours and would like to propose that the test interval be changed to a 700-flight-hour interval. This would allow for routine scheduling of aircraft and add only 1.5 man hours to its current B-check workload.

We agree that the test interval can be changed to a 700-flight-hour interval. The manufacturer has completed a reassessment of the probability of the loss of the automatic switching feature. As a result of a detailed Failure Mode Effect Analysis, and inclusion of the latest fleet cumulative flight-hour data, the necessary safety objective can be met with an extension of the maximum exposure time to 700 flight hours. We have changed paragraph (h) of this AD accordingly.

4. Of the 189 airplanes of U.S. registry that are affected by the NPRM, the commenter currently operates 107, with 8 more in a passenger-to-freighter conversion process. All of these airplanes will require the proposed modification. The referenced service bulletins specify that obtaining the kits to accomplish the modification will take a 4-month lead-time from receipt of order. This makes scheduling and accomplishing the modification on all its airplanes within the 12 month compliance time virtually impossible. The commenter proposes a 36-month compliance time to allow the commenter to take advantage of its C-check intervals, which are Airbus specified at 910 days or 3,500 flight hours, whichever occurs first. The proposed compliance time also takes into consideration that maintenance facilities are down for host-country holidays, and limited maintenance is accomplished in the U.S. from October through January for maximum airlift during that time.

We agree to extend the compliance time for the modification to within 18 months after the effective date of this AD. We find that, for the airplane models affected by this AD, operators should be able to accomplish the modification within 18-months. For operators that encounter difficulty accomplishing the modification within this timeframe, under the provisions of paragraph (j) of this AD, we may approve a request for further adjustment to the compliance time if data are submitted to substantiate that such an adjustment would provide an acceptable level of safety.

5. The cost estimates for the NPRM differ from the cost estimates specified in the referenced service bulletins. The service bulletins specify a minimum of two Airbus kits, and some airplanes will need three, depending on whether other modifications are embodied. The commenter has computed a required parts price range of $5,410 to $9,350, with an associated work hour range of 31 to 36. Based on these figures, the estimated cost for the proposed modification would be between $7,425 and $11,690 per airplane. The service bulletins also indicate that the operational test will require 1.5 work hours to accomplish, which is an additional $97.50 per airplane, per test cycle.

We do not agree, the cost of the kits and the number of work hours are the same as those specified in the referenced service bulletins. The cost analysis in AD rulemaking actions typically does not include incidental costs such as the time required to gain access and close up, time necessary for planning, or time necessitated by other administrative actions. Because the work hours may vary significantly from operator to operator, depending on the airplane configuration, they are almost impossible to calculate. We have made no change to the AD in this regard.

6. The corrective action specified in paragraph (i) of the NPRM is too vague and will slow the repair process, as follows: ''If any operational test required by paragraph (h) of this AD fails: Before further flight, accomplish any applicable repair per a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Générale de l'Aviation Civile (or its delegated agent).'' The literal interpretation of this, as written, is that when a test fails, the airplane is grounded until the FAA grants an approved method that would restore the airplane to an operational condition. This prevents the operator from using established maintenance practices until an ''approved method'' is granted by the FAA or DGAC. The approval required is implied to be per airplane, since the operational test is done by individual airplane. Allowing the use of standard maintenance practices would allow an operator to restore the affected airplane on-site and expedite the return to operational status. The FAA-approved operator's general maintenance manual, aircraft maintenance manual, illustrated parts catalog, wire diagram manual, and system schematic manual, have always been accepted tools to troubleshoot and restore an airplane to operational status. Instances of a failed test in which standard maintenance practices do not solve the problem should be the only time an AMOC would be required by the FAA or DGAC.

We agree that, in the case of a failed test in which standard maintenance practices do not solve the problem, a repair approved by us or the DGAC is required. The service bulletins for the test do not provide formal repair/trouble shooting instructions if a test fails. However, the manufacturer has confirmed that their intent was that any repair/trouble shooting following such failure should be performed per basic maintenance practices, using standard Airbus documentation. We have included the aircraft wiring manual, trouble shooting manual, and aircraft maintenance manual as approved methods for accomplishing the repairs specified in paragraph (i) of this AD.

**Explanation of Change to Applicability**

We have revised the applicability of the NPRM to identify model designations as published in the most recent type certificate data sheet for the affected models.

**Conclusion**

We have carefully reviewed the available data, including the comments that have been submitted, and

determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

**Costs of Compliance**

This AD affects about 189 airplanes of U.S. registry.

It will take between approximately 10 and 36 work hours per airplane to accomplish the modification (depending on the number of kits needed), at an average labor rate of $65 per work hour. Required parts will cost approximately between $310 and $4,880 per airplane. Based on these figures, the estimated cost of the modification is between $960 and $7,220 per airplane.

It will take about 1 work hour per airplane to accomplish the operational test, at an average labor rate of $65 per work hour. Based on these figures, the estimated cost of the test is $12,285, or $65 per airplane, per test cycle.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**2005–20–06 Airbus:** Amendment 39–14299. Docket No. FAA–2005–20796; Directorate Identifier 2004–NM–160–AD.

**Effective Date**

(a) This AD becomes effective November 3, 2005.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to all Airbus Model A300 B2–1A, B2–1C, B2K–3C, and B2–203 and A300 B4–2C, B4–103, and B4–203 airplanes; Model A300 B4–601, B4–603, B4–620, and B4–622, A300 B4–605R and B4–622R, A300 F4–605R and F4–622R, and A300 C4–605R Variant F airplanes; and Model A310–203, –204, –221, and –222 and –304, –322, –324, and –325 airplanes; certificated in any category.

**Unsafe Condition**

(d) This AD was prompted by a report of temporary loss of six cathode ray tube (CRT) flight displays and the integral lighting of the standby horizon indicator in the cockpit during takeoff, due to failure of the normal electrical power circuit. That power circuit supplies power to both the CRTs and standby horizon indicator backlight. We are issuing this AD to prevent loss of the integral lighting due to failure of the normal electrical power circuit, which could result in inability of the pilot to read the backup attitude information during takeoff, and possible deviation from the intended flight path.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Required Service Information**

(f) Unless otherwise specified in this AD, the term ''service bulletin,'' as used in this AD, means the Accomplishment Instructions of the applicable service bulletin identified in Table 1 of this AD. Airbus Service Bulletins A300–33–0126, A300–33–6049, and A310–33–2047 specify to submit certain information to the manufacturer, but this AD does not include that requirement.

TABLE 1.—SERVICE BULLETINS

| For Airbus Models— | Use Airbus Service Bulletin(s)— | Revision— | Dated— | And, for actions done before the effective date of this AD, credit is given for prior accomplishing of— |
|---|---|---|---|---|
| A300 B2 and A300 B4 series | A300–31–0077 (Airbus Modification 12513). | 01 | January 28, 2005 | Original, dated March 2, 2004. |
| | A300–33–0126 | Original | April 5, 2004 | N/A. |
| A300 B4–600; A300 B4–600R and F4–600R series; and A300 C4–605R Variant F airplanes. | A300–31–6105 (Airbus Modifications 12513 and 12730). | 03 | December 20, 2004. | Revision 02, dated May 27, 2003. |
| | A300–33–6049 | 02 | April 25, 2005 | Original, dated April 5, 2004; Revision 01, dated May 28, 2004. |
| A310 series | A310–31–2120 (Airbus Modification 12513). | 03 | June 22, 2005 | Original, dated November 19, 2002; Revision 01, dated May 27, 2003; Revision 02, dated January 28, 2005. |

TABLE 1.—SERVICE BULLETINS—Continued

| For Airbus Models— | Use Airbus Service Bulletin(s)— | Revision— | Dated— | And, for actions done before the effective date of this AD, credit is given for prior accomplishing of— |
|---|---|---|---|---|
| | A310–33–2047 | Original | April 5, 2004 | N/A. |

**Modification**

(g) For airplanes on which Airbus Modifications 12513 and 12730 have not been accomplished: Within 18 months after the effective date of this AD, modify the electrical power supply logic of the integral lighting for the standby horizon indicator in the cockpit in accordance with the service bulletin.

**Repetitive Operational Tests**

(h) For all airplanes: Within 700 flight hours after accomplishing the modification required by paragraph (g) of this AD, or within 700 flight hours after the effective date of this AD, whichever is later, accomplish the operational test of the integral lighting logic system in accordance with the service bulletin. Repeat the test thereafter at intervals not to exceed 700 flight hours.

**Corrective Action**

(i) If any operational test required by paragraph (h) of this AD fails: Before further flight, accomplish any applicable repair per a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent). Airbus A300–600 and A310 Trouble Shooting Manuals; Airbus A300–600 and A310 Aircraft Wiring Manuals; and Airbus A300–600 and A310 Aircraft Maintenance Manuals, are approved methods for accomplishing the repair, as applicable. Except, in the case of a failed test in which standard maintenance practices do not solve the problem, a repair approved by the FAA or the DGAC is required.

**Alternative Methods of Compliance (AMOCs)**

(j) The Manager, International Branch, ANM–116, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

**Related Information**

(k) French airworthiness directive F–2004–098, dated July 7, 2004, also addresses the subject of this AD.

**Material Incorporated by Reference**

(l) You must use the applicable service bulletin identified in Table 2 of this AD to perform the actions that are required by this AD, unless the AD specifies otherwise.

TABLE 2.—SERVICE BULLETINS INCORPORATED BY REFERENCE

| Airbus Service Bulletin— | Revision— | Dated— |
|---|---|---|
| A300–31–0077 | 01 | January 28, 2005. |
| A300–31–6105 | 03 | December 20, 2004. |
| A300–33–0126, excluding Appendix 01 | Original | April 5, 2004. |
| A300–33–6049, excluding Appendix 01 | 02 | April 25, 2005. |
| A310–31–2120 | 03 | June 22, 2005. |
| A310–33–2047, excluding Appendix 01 | Original | April 5, 2004. |

The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Room PL–401, Nassif Building, Washington, DC; on the internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

Issued in Renton, Washington, on September 20, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–19229 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–13–U**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–22540; Directorate Identifier 2004–NM–137–AD; Amendment 39–14301; AD 2005–20–08]**

**RIN 2120–AA64**

## Airworthiness Directives; Airbus Model A330–200 and –300 Series Airplanes; and Model A340–200 and –300 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Final rule; request for comments.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Airbus transport category airplanes, identified above. This AD requires an inspection to determine if a certain lower pin (p-pin) of the retraction actuator of the main landing gear (MLG) is installed. If the affected p-pin is installed, this AD requires a one-time inspection of the p-pin for correct grease hole position and cracking; repetitive daily inspections for pin migration; and eventual replacement of all p-pins with new p-pins. For any p-pin that is cracked or shows pin migration, this AD requires immediate replacement with a new p-pin. Replacing the p-pin with one that is correctly manufactured (i.e., that has the correct grease hole position) is terminating action for the repetitive inspections. This AD results from a report that a cracked p-pin was found when the MLG was removed for overhaul. We are issuing this AD to prevent failure of the p-pin, which could result in degradation of the MLG structural integrity and possible hazardous landing.

**DATES:** Effective October 14, 2005.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of October 14, 2005.

We must receive comments on this AD by November 28, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for service information identified in this AD.

You may examine the contents of the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Washington, DC. This docket number is FAA–2005–22540; the directorate identifier for this docket 2004–NM–137–AD.

**FOR FURTHER INFORMATION CONTACT:** Tim Backman, Aerospace Engineer, ANM–116, International Branch, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2797; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

**Comments Invited**

Although this is a final rule that was not preceded by notice and an opportunity for public comment, we invite you to submit any relevant written data, views, or arguments regarding this AD. Include ''Docket No. FAA–2005–22540; Directorate Identifier 2004–NM–137–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the AD. We will consider all comments received by the closing date and may amend the AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

**Examining the Docket**

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

**Discussion**

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified us that an unsafe condition may exist on Airbus Model A330–200 and –300 series airplanes; and Model A340–200 and –300 series airplanes; equipped with main landing gear (MLG) retraction actuator lower pin(s) (p-pins) having part number (P/N) 201275602. The DGAC advises that when the MLG was removed for overhaul, a p-pin, which connects the lower end of the retraction actuator to the main fitting, was found to be cracked. Investigators concluded that the crack initiated from the center grease hole of the p-pin, and that the center grease hole was machined in an incorrect position, 90 degrees from its normal position. The two end holes of the p-pin were also found to be machined 90 degrees from the original design. Failure of the p-pin could lead to an undamped extension of the MLG, causing high loads throughout the entire MLG and damage to the gear structure, the side stay assembly, and the bogie beam. This condition, if not corrected, could result in degradation of the MLG structural integrity and a possible hazardous landing.

**Relevant Service Information**

Airbus has issued All Operators Telex (AOT) A330–32A3181, dated May 27, 2004 (for Model A330–200, and –300 series airplanes); and AOT A340–32A4224, dated May 27, 2004 (for Model A340–200 and –300 series airplanes). The AOTs describe procedures for determining if the affected p-pins are installed. For all affected p-pins, including spares, the AOTs describe procedures for a one-time inspection to determine the position of the grease holes and for cracking of the p-pin. If the position of any grease hole is not correct, the AOTs specify that it should be replaced within 800 flight hours. Until this replacement is accomplished, the AOTs give procedures for daily external visual checks for pin migration. If pin migration is found, or if any crack is found during the one-time inspection, the AOTs specify that the pin should be replaced before further flight. The AOTs also recommend that operators complete a reporting form and send it to the part vendor. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DGAC mandated the service information and issued French airworthiness directive F–2004–084, dated June 23, 2004, to ensure the continued airworthiness of these airplanes in France.

The AOTs refer to Messier-Dowty Service Bulletin A33/34–32–229, Revision 1, including Appendixes A and B, dated June 4, 2004, as an additional source of service information for inspecting the p-pins and for replacing them with a new pin having the same P/N or a new pin having a new P/N.

**FAA's Determination and Requirements of This AD**

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. We have examined the DGAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for products of this type design that are certificated for operation in the United States.

Therefore, we are issuing this AD to prevent failure of the p-pin, which could result in degradation of the MLG structural integrity and possible hazardous landing. This AD requires accomplishing the actions specified in the service information described previously.

**Difference Between This AD and the French Airworthiness Directive**

Although the French airworthiness directive specifies that operators report inspection results to the parts manufacturer, this AD does not include that requirement.

**Clarification of Inspection Language**

The French airworthiness directive and the AOTs specify that operators should do a ''visual inspection'' or ''one-time inspection'' to detect incorrectly manufactured p-pins. In this AD we refer to this inspection as a ''detailed inspection.'' Note 2 of this AD defines this inspection.

The French airworthiness directive and the AOTs specify that operators should do an ''external visual inspection'' or ''external visual check'' of the p-pin for pin migration. In this AD we refer to this inspection as a ''general visual inspection.'' Note 3 of this AD defines this inspection.

**Costs of Compliance**

None of the airplanes affected by this action are on the U.S. Register. All airplanes affected by this AD are currently operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, we consider this AD necessary to ensure that the unsafe condition is addressed if any affected airplane is imported and placed on the U.S. Register in the future.

The following table provides the estimated costs to comply with this AD for any affected airplane that might be imported and placed on the U.S. Register in the future.

ESTIMATED COSTS

| Action | Work hours | Average labor rate per hour | Parts cost | Cost per airplane |
|---|---|---|---|---|
| Inspection to determine P/N of p-pins | 1 | $65 | None | $65 |
| Detailed inspection for incorrectly manufactured p-pins | 1 | 65 | None | 65 |

**FAA's Determination of the Effective Date**

No airplane affected by this AD is currently on the U.S. Register. Therefore, providing notice and opportunity for public comment is unnecessary before this AD is issued, and this AD may be made effective in less than 30 days after it is published in the **Federal Register**.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

**2005–20–08 Airbus:** Amendment 39–14301. Docket No. FAA–2005–22540; Directorate Identifier 2004–NM–137–AD.

**Effective Date**

(a) This AD becomes effective October 14, 2005.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Airbus Model A330–201, –202, –203, –223, –243, –301, –321, –322, –323, –341, –342, and –343 airplanes; and Model A340–211, –212, –213, –311, –312, and –313 airplanes; certificated in any category.

**Unsafe Condition**

(d) This AD results from a report that a p-pin, P/N 201275602, which connects the lower end of the main landing gear (MLG) retraction actuator to the main fitting, was found to be cracked when the MLG was removed for overhaul. The FAA is issuing this AD to prevent failure of the p-pin, which could result in degradation of the MLG structural integrity and possible hazardous landing.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Service Information Reference**

(f) For the purposes of this AD, the term ''AOT'' (All Operators Telex) means the AOT identified in paragraph (f)(1) or (f)(2) of this AD, as applicable.

(1) For Model A330–201, –202, –203, –223, –243, –301, –321, –322, –323, –341, –342, and –343 airplanes: AOT A330–32A3181, dated May 27, 2004.

(2) For Model A340–211, –212, –213, –311, –312, and –313 airplanes: AOT A340–32A4224, dated May 27, 2004.

**Note 1:** The AOTs refer to Messier-Dowty Service bulletin A33/34–32–229, Revision 1, including Appendixes A and B, dated June 4, 2004, as an additional source of service information for inspecting the p-pins and for replacing them with a new pin having the same P/N or a new pin having a new P/N.

**Inspection To Determine Part Number**

(g) Within 100 flight cycles or 3 months after the effective date of this AD, whichever

occurs earlier: Inspect the p-pins of the retraction actuator of the MLG to determine whether part number (P/N) 201275602 is installed. Do the inspection in accordance with the applicable AOT. A review of airplane maintenance records is acceptable in lieu of this inspection if the P/N of the p-pin can be conclusively determined from that review. If a p-pin with a part number that is different than P/N 201275602 is installed, or if any P/N 201275602 p-pin has a batch number or serial number identified in Appendix A of Messier-Dowty Service Bulletin A33/34–32–229, Revision 1, dated June 4, 2004, no further action is required by this AD, except as provided by paragraph (l) of this AD.

**Inspection for Cracking and Grease Hole Position**

(h) If the inspection required by paragraph (g) of this AD shows that an affected P/N 201275602 is installed, before further flight after determining the P/N in accordance with paragraph (g) of this AD: Do a detailed inspection for cracking of the p-pin and position of the grease holes, in accordance with the applicable AOT. If any incorrect grease hole position is found or if any crack is found, do the applicable actions in paragraphs (i) and (j) of this AD at the times specified in those paragraphs. If all grease hole positions are correct and no cracking is found, no further action is required by this paragraph.

**Note 2:** For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

**Related Investigative and Corrective Actions**

(i) If the inspection required by paragraph (h) of this AD shows that a p-pin has any incorrect grease hole position, but no cracking: Do the actions in paragraph (i)(1) and (i)(2) of this AD. Do all actions in accordance with the applicable AOT.

(1) Within 24 hours after the inspection required by paragraph (h) of this AD: Do a general visual inspection of the p-pin for pin migration, in accordance with the applicable AOT. Repeat the inspection at intervals not to exceed 24 hours until the replacement required by paragraph (i)(2) or (j) of this AD is accomplished.

(2) Except as required by paragraph (j) of this AD, within 800 flight hours after doing the inspection required by paragraph (h) of this AD: Replace the p-pin with a new p-pin of the same P/N 201275602 with correctly positioned grease holes, or with a new p-pin having new P/N 201478612, in accordance with the applicable AOT.

**Note 3:** For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(j) If any inspection required by paragraphs (h) and (i) of this AD shows a crack or pin migration, before further flight: Replace the p-pin with a new p-pin of the same P/N 201275602 with correctly positioned grease holes, or with a new p-pin having new P/N 201478612. Do all actions in accordance with the applicable AOT.

**No Reporting Required**

(k) Although the AOTs reference a reporting requirement in paragraph 4.3, ''Material—Tooling,'' that reporting is not required by this AD.

**Parts Installation**

(l) As of the effective date of this AD, no person may install, on any airplane, a p-pin, P/N 201275602, unless it has been inspected and any applicable additional inspections corrective actions have been done in accordance with this AD.

**Alternative Methods of Compliance (AMOCs)**

(m)(1) The Manager, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

**Related Information**

(n) French airworthiness directive F–2004–084, dated June 23, 2004, also addresses the subject of this AD.

**Material Incorporated by Reference**

(o) You must use Airbus All Operators Telex A330–32A3181, dated May 27, 2004; or Airbus All Operators Telex A340–32A4224, dated May 27, 2004; as applicable; to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of these documents in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov;* or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 20, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–19228 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–21170; Directorate Identifier 2002–NM–124–AD; Amendment 39–14298; AD 2005–20–05]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 767–200 and 767–300 Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting a new airworthiness directive (AD) for certain Boeing Model 767–200 and 767–300 series airplanes. This AD requires performing a general visual inspection to determine the part number of the I-beams of the center overhead stowage bin modules to identify I-beams having 9.0g (gravitational acceleration) tie rods attached and to determine the configuration of the center overhead stowage bin modules. For certain center overhead stowage bin modules, this AD requires installing support straps. This AD results from tests conducted by the airplane manufacturer. We are issuing this AD to prevent failure of the attachment of the 9.0g tie rods to the center overhead stowage bin modules. This failure could result in collapse of those stowage bin modules, and consequent injury to passengers and crew and interference with their ability to evacuate the airplane in an emergency.

**DATES:** Effective November 3, 2005.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of November 3, 2005.

**ADDRESSES:** You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this AD.

**FOR FURTHER INFORMATION CONTACT:** Susan Rosanske, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6448; fax (425) 917–6590.

**SUPPLEMENTARY INFORMATION:**

**Examining the Docket**

You may examine the AD docket on the Internet at *http://dms.dot.gov* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the street address stated in the **ADDRESSES** section.

**Discussion**

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to certain Boeing Model 767–200 and 767–300 series airplanes. That NPRM was published in the **Federal Register** on May 10, 2005 (70 FR 24488). That NPRM proposed to require performing a general visual inspection to determine the part number of the I-beams of the center overhead stowage bin modules to identify I-beams having 9.0g (gravitational acceleration) tie rods attached and to determine the configuration of the center overhead stowage bin modules. For certain center overhead stowage bin modules, that NPRM also proposed to require installing support straps.

**Comments**

We provided the public the opportunity to participate in the development of this AD. We have considered the comments that have been received on the NPRM.

**Request To Revise Applicability**

One commenter requests that we revise the applicability of the NPRM to exclude airplanes that have been converted in accordance with a supplemental type certificate (STC) to a freighter configuration without the subject center overhead stowage bin modules. The commenter recommends changing the applicability paragraph to read, ''This AD applies to Boeing Model 767–200 and –300 series airplanes equipped with center overhead stowage bin modules, certified in any category; as identified in Boeing Special Attention Service Bulletin 767–25–0320, dated April 11, 2002.'' The commenter states that this revision will reduce the number of alternate method of compliance (AMOC) requests submitted to the FAA, and, therefore, will reduce the use of FAA resources.

We agree that airplanes without the subject center overhead stowage bin modules should not be subject to the requirements of this AD, because, without those subject stowage bin modules, those airplanes are not subject to the unsafe condition addressed by this AD. Therefore, we have revised the applicability of the final rule to exclude airplanes that are not equipped with center overhead stowage bin modules.

**Request To Delay Issuance of AD and To Reference Latest Service Information**

The other commenter, the manufacturer, requests that we delay issuance of the rule until it releases Revision 1 to Boeing Special Attention Service Bulletin 767–25–0320 (the original issue of this service bulletin was referenced in the NPRM as the appropriate source of service information for doing the proposed actions), which it intends to do at an unspecified time in the future. The commenter further states that the revision will clarify Figures 1 and 6 of the service bulletin, but it will not impact the intent of the service bulletin.

We do not agree to delay issuance of this AD. We do not consider that delaying this action until after the release of the manufacturer's planned service bulletin is warranted, since the currently referenced service bulletin contains procedures that are sufficient for correcting the unsafe condition addressed by this AD. Once the revised service bulletin is released, operators may submit the revised instructions as a proposed AMOC, in accordance with paragraph (i) of this AD. We have not changed the final rule in this regard.

**Clarification of Alternative Method of Compliance (AMOC) Paragraph**

We have revised this action to clarify the appropriate procedure for notifying the principal inspector before using any approved AMOC on any airplane to which the AMOC applies.

**Conclusion**

We have carefully reviewed the available data, including the comments that have been received, and determined that air safety and the public interest require adopting the AD with the changes described previously. We have determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

**Costs of Compliance**

There are about 747 airplanes of the affected design in the worldwide fleet. There are about 281 airplanes of U.S. registry. The following table provides the estimated costs for U.S. operators to comply with this AD. There are approximately 13 center overhead stowage bin modules per airplane and one I-beam per module.

ESTIMATED COSTS

| Action | Work hours | Average labor rate per hour | Parts | Cost per airplane | Fleet cost |
|---|---|---|---|---|---|
| Inspection to determine P/N and configuration. | 1, per I-beam | $65 | None | $65, per I-beam | $237,445 |
| Strap installation | 12, per I-beam | $65 | $816, per I-beam | $1,596, per I-beam | $5,830,188 |

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, Section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in Subtitle VII, Part A, Subpart III, Section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that this AD:

(1) Is not a ''significant regulatory action'' under Executive Order 12866;

(2) Is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

(3) Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

**Adoption of the Amendment**

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

■ 2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

**2005–20–05 Boeing:** Amendment 39–14298. Docket No. FAA–2005–21170; Directorate Identifier 2002–NM–124–AD.

**Effective Date**

(a) This AD becomes effective October 31, 2005.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to Boeing Model 767–200 and 767–300 series airplanes equipped with center overhead stowage bin modules, certificated in any category; as identified in Boeing Special Attention Service Bulletin 767–25–0320, dated April 11, 2002.

**Unsafe Condition**

(d) This AD results from tests conducted by the airplane manufacturer. We are issuing this AD to prevent failure of the attachment of the 9.0g (gravitational acceleration) tie rods to the center overhead stowage bin modules. This failure could result in collapse of those stowage bin modules, and consequent injury to passengers and crew and interference with their ability to evacuate the airplane in an emergency.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Inspection to Determine I-beam Part Number (P/N)**

(f) Within 36 months after the effective date of this AD: Perform a general visual inspection of the center overhead stowage bin modules to determine the P/N of each I-beam and to determine the configuration of each center overhead stowage bin module. Do the inspection in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0320, dated April 11, 2002.

**Note 1:** For the purposes of this AD, a general visual inspection is: ''A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made from within touching distance unless otherwise specified. A mirror may be necessary to ensure visual access to all surfaces in the inspection area. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or droplight and may require removal or opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.''

(g) For any I-beam found having P/N 412T2040–29 during the inspection required by paragraph (f) of this AD: No further action is required by this AD for that I-beam only.

**Support Strap Installation**

(h) For any I-beam found having a P/N other than P/N 412T2040–29 during the inspection required by paragraph (f) of this AD: Before further flight, do the actions in paragraph (h)(1) or (h)(2) of this AD, as applicable, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 767–25–0320, dated April 11, 2002.

(1) If the forward-most stowage bin module was inspected: Before further flight, install support straps having P/N 412T2043–101 and 412T2043–102 on the center overhead stowage bin module, in accordance with Figures 3, 4, and 5 of the Accomplishment Instructions of the service bulletin.

(2) If the stowage bin module inspected was other than the forward-most stowage bin module: Before further flight, do the actions specified in paragraph (h)(2)(i) or (h)(2)(ii) of this AD, as applicable.

(i) For center overhead stowage bin modules having ''Configuration A,'' as specified in the service bulletin: Before further flight, do the actions specified in paragraph (h)(1) of this AD.

(ii) For center overhead stowage bin modules having a configuration other than ''Configuration A,'' as specified in the service bulletin: Before further flight, install two support straps having P/N 412T2043–119 on the center overhead stowage bin module, in accordance with Figures 3, 4, and 6 of the Accomplishment Instructions of the service bulletin.

**Alternative Methods of Compliance (AMOCs)**

(i)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

**Material Incorporated by Reference**

(j) You must use Boeing Special Attention Service Bulletin 767–25–0320, dated April 11, 2002, to perform the actions that are required by this AD, unless the AD specifies otherwise. The Director of the Federal Register approved the incorporation by reference of this document in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for a copy of this service information. You may review copies at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, Nassif Building, Washington, DC; on the Internet at *http://dms.dot.gov*; or at the National Archives and Records Administration (NARA). For information on the availability of this material at the NARA, call (202) 741–6030, or go to *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on September 12, 2005.

**Kalene C. Yanamura,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–19227 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–13–P**

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 1

## Fees for Reviews of the Rule Enforcement Programs of Contract Markets and Registered Futures Association

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Establish the FY 2005 schedule of fees.

**SUMMARY:** The Commission charges fees to designated contract markets and the National Futures Association (NFA) to recover the costs incurred by the Commission in the operation of a program which provides a service to these entities. The fees are charged for the Commission's conduct of its program of oversight of self-regulatory rule enforcement programs (NFA and the contract markets are referred to as SROs).

The calculation of the fee amounts to be charged for FY 2005 is based on an average of actual program costs incurred during FY 2002, 2003, and 2004, as explained below. The FY 2005 fee schedule is set forth in the **SUPPLEMENTARY INFORMATION**. Electronic payment of fees is required.

**EFFECTIVE DATES:** The FY 2005 fees for Commission oversight of each SRO rule enforcement program must be paid by each of the named SROs in the amount specified by no later than November 28, 2005.

**FOR FURTHER INFORMATION CONTACT:** Stacy Dean Yochum, Counsel to the Executive Director, Commodity Futures Trading Commission, (202) 418–5160, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581. For information on electronic payment, contact Stella Lewis, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581, (202) 418–5186.

**SUPPLEMENTARY INFORMATION:**

## I. General

This notice relates to fees for the Commission's review of the rule enforcement programs at the registered futures associations and contract markets regulated by the Commission.

## II. Schedule of Fees

Fees for the Commission's review of the rule enforcement programs at the registered futures associations and contract markets regulated by the Commission:

| Entity | Fee amount |
|---|---|
| Chicago Board of Trade | $5,127 |
| Chicago Mercantile Exchange | 256,683 |
| Kansas City Board of Trade | 13,859 |
| New York Mercantile Exchange | 125,378 |
| Minneapolis Grain Exchange | 12,691 |
| National Futures Association | 33,692 |
| New York Board of Trade | 36,245 |
| OneChicago | 3,207 |
| Total | 486,882 |

## III. Background Information

### *A. General*

The Commission recalculates the fees charged each year with the intention of recovering the costs of operating this Commission program.[1] All costs are accounted for by the Commission's Management Accounting Structure Codes (MASC) system, which records each employee's time for each pay period. The fees are set each year based on direct program costs, plus an overhead factor.

### *B. Overhead Rate*

The fees charged by the Commission to the SROs are designed to recover program costs, including direct labor costs and overhead. The overhead rate is calculated by dividing total Commission-wide overhead direct program labor costs into the total amount of the Commission-wide overhead pool. For this purpose, direct program labor costs are the salary costs of personnel working in all Commission programs. Overhead costs consist generally of the following Commission-wide costs; indirect personnel costs (leave and benefits), rent, communications, contract services, utilities, equipment, and supplies. This formula has resulted in the following overhead rates for the most recent three years (rounded to the nearest whole percent): 129 percent for fiscal year 2002, 113 percent for fiscal year 2003, and 109 percent for fiscal year 2004. These overhead rates are applied to the direct labor costs to calculate the costs of oversight of SRO rule enforcement programs.

### *C. Conduct of SRO Rule Enforcement Reviews*

Under the formula adopted in 1993 (58 FR 42463, Aug. 11, 1993), which appears at 17 CFR part 1 appendix B, the Commission calculates the fee to recover the costs of its review of rule enforcement programs, based on the three-year average of the actual cost of performing reviews at each SRO. The cost of operation of the Commission's program of SRO oversight varies from SRO to SRO, according to the size and complexity of each SRO's program. The three-year averaging is intended to smooth out year-to-year variations in cost. Timing of review may affect costs—a review may span two fiscal years and fiscal years and reviews are not conducted at each SRO each year. Adjustments to actual costs may be made to relieve the burden on an SRO with a disproportionately large share of program costs.

The Commission's formula provides for a reduction in the assessed fee if an SRO has a smaller percentage of United States industry contract volume than its percentage of overall Commission oversight program costs. This adjustment reduces the costs so that as a percentage of total Commission SRO oversight program costs, they are in line with the pro rata percentage for that SRO of United States industry-wide contract volume.

The calculation made is as follows: The fee required to be paid to the Commission by each contract market is equal to the lesser of actual costs based on the three-year historical average of costs for that contract market or one-half of average costs incurred by the Commission for each contract market for the most recent three years, plus a pro rata share (based on average trading volume for the most recent three years) of the aggregate of average annual costs of all contract markets for the most recent three years. The formula for calculating the second factor is: 0.5a + 0.5vt = current fee. In this formula, ''a'' equals the average annual costs, ''v'' equals the percentage of total volume across exchanges over the last three years, and ''t'' equals the average annual costs for all exchanges. NFA, the only registered futures association regulated by the Commission, has no contracts traded; hence its fee is based simply on costs for the most recent three fiscal years.

This table summarizes the data used in the calculations and the resulting fee for each entity:

[1] See Section 237 of the Futures Trading Act of 1982, 7 USC 16a and 31 USC 9701. For a broader discussion of the history of Commission Fees, see 52 FR 46070 (Dec. 4, 1987).

| | Three-year average actual costs | Three-year percentage of volume | Average year 2005 fee |
|---|---|---|---|
| Chicago Board of Trade | $5,127 | 33.4148 | $5,127 |
| Chicago Mercantile Exchange | 256,683 | 51.6763 | 256,683 |
| New York Mercantile Exchange | 186,234 | 11.4811 | 125,378 |
| New York Board of Trade | 61,296 | 1.9919 | 36,245 |
| Kansas City Board of Trade | 22,034 | 1.0113 | 13,859 |
| Minneapolis Grain Exchange | 24,591 | 0.1409 | 12,691 |
| OneChicago | 6,011 | 0.0718 | 3,207 |
| Subtotal | 561,977 | 99.7881 | 453,190 |
| National Futures Association | 33,692 | N/A | 33,692 |
| Total | 589,657 | 99.7881 | 486,882 |

An example of how the fee is calculated for one exchange, the Minneapolis Grain Exchange, is set forth here:

a. Actual three-year average costs equal $24,591

b. The alternative computation is: (.5) ($24,591) +(.5)(.001409)($561,977) = $12,691.

c. The fee is the less of a or b; in this case $12,691.

As noted above, the alternative calculation based on contracts traded is not applicable to the NFA because it is not a contract market and has no contracts traded. The Commission's average annual cost for conducting oversight review of the NFA rule enforcement program during fiscal year 2002 through 2004 was $33,692 (one-third of $101,076). The fee to be paid by the NFA for the current fiscal year is $33,692.

Payment Method

The Debt Collection Improvement Act (DCIA) requires deposits of fees owed to the government by electronic transfer of funds (See 31 U.S.C. 3720). For information about electronic payments, please contract Stella Lewis at (202) 418–5186 or *slewis@cftc.gov*, or see the CFTC Web site at *http://www.cftc.gov,* specifically *http://www.cftc.gov/cftc/cftcelectronicpayments.htm.*

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, requires agencies to consider the impact of the rules on small business. The fees implemented in this release affect contract markets (also referred to as exchanges) and registered futures associations. The Commission has previously determined that contract markets and registered futures associations are not ''small entities'' for purposes of the Regulatory Flexibility Act. Accordingly, the Chairman, on behalf of the Commission, certifies pursuant to 5 USC 605(b) that the fees implemented here will not have a significant economic impact on a substantial number of small entities.

Issued in Washington, DC on September 23, 2005, by the Commission.

**Edward W. Colbert,**

*Deputy Secretary of the Commission.*

[FR Doc. 05–19461 Filed 9–28–05; 8:45 am]

**BILLING CODE 6351–01–M**

## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Parts 210, 228, 229, 240 and 249

**[Release Nos. 33–8618; 34–52492; File Nos. S7–40–02; S7–06–03]**

**RIN 3235–AI66 and 3235–AI79**

### Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports of Companies That Are Not Accelerated Filers

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule; extension of compliance dates; request for comment.

**SUMMARY:** We are extending the compliance dates that were published on March 8, 2005, in Release No. 33–8545 [70 FR 11528], for companies that are not accelerated filers, for certain amendments to Rules 13a–15 and 15d–15 under the Securities Exchange Act of 1934, Items 308(a) and (b) of Regulations S–K and S–B, Item 15 of Form 20–F and General Instruction B of Form 40–F. These amendments require companies, other than registered investment companies, to include in their annual reports a report of management and accompanying auditor's report on the company's internal control over financial reporting. The amendments also require management to evaluate, as of the end of each fiscal period, any change in the company's internal control over financial reporting that occurred during the period that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting. We are also extending the compliance dates applicable to companies that are not accelerated filers for amendments to certain representations that must be included in the certifications required by Exchange Act Rules 13a–14 and 15d–14 regarding a company's internal control over financial reporting. Finally, we are soliciting comment about the implementation of these rules.

**DATES:** *Effective Date:* The effective date published on June 18, 2003, in Release No. 33–8238 [68 FR 36636] remains August 14, 2003. The effective date of this document is September 29, 2005.

*Comment Date:* Comments should be received on or before October 31, 2005.

*Compliance Dates:* The compliance dates are extended as follows: A company that is not an accelerated filer must begin to comply with these requirements for its first fiscal year ending on or after July 15, 2007. Companies must begin to comply with the provisions of Exchange Act Rule 13a–(d) or 15d–(d), whichever applies, requiring an evaluation of changes to internal control over financial reporting requirements with respect to the company's first periodic report due after the first annual report that must include management's report on internal control over financial reporting.

In addition, during the extended compliance period, a company that is not an accelerated filer may continue to omit the amended portion of the introductory language in paragraph 4 of the certification required by Exchange Act Rules 13a–14(a) and 15d–14(a) that refers to the certifying officers' responsibility for establishing and maintaining internal control over financial reporting for the company, as well as paragraph 4(b). This language, however, must be provided in the first annual report required to contain

management's internal control report and in all periodic reports filed thereafter. The extended compliance dates also apply to the amendments of Exchange Act Rules 13a–15(a) and 15d–15(a) relating to the maintenance of internal control over financial reporting. The compliance dates relating to accelerated filers and registered investment companies published in Release No. 33–8392 [69 FR 9722] are not affected by this release.

While the definition of an accelerated filer in Exchange Act Rule 12b–2 previously has had applicability only for a foreign private issuer that files its Exchange Act periodic reports on Forms 10–K and 10–Q, the definition by its terms does not exclude foreign private issuers. As of December 1, 2005, a foreign private issuer that is an accelerated filer and files its annual report on Form 20–F will become subject to a requirement in new Item 4A of Form 20–F to disclose unresolved staff comments. This change was part of our recently adopted Securities Offering Reform final rules published in Release No. 33–8591 [70 FR 44722]. A foreign private issuer that is an accelerated filer under the Exchange Act Rule 12b–2 definition, and that files its annual reports on Form 20–F or Form 40–F, must begin to comply with the internal control over financial reporting and related requirements in the annual report for its first fiscal year ending on or after July 15, 2006. A foreign private issuer that is not an accelerated filer under the Exchange Act Rule 12b–2 definition must begin to comply in its annual report for its first fiscal year ending on or after July 15, 2007.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–06–03 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number S7–06–03. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/other.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Sean Harrison, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

**SUPPLEMENTARY INFORMATION:** On June 5, 2003,[1] the Commission adopted several amendments to its rules and forms implementing Section 404 of the Sarbanes-Oxley Act of 2002.[2] Among other things, these amendments require companies, other than registered investment companies, to include in their annual reports a report of management on the company's internal control over financial reporting and an accompanying auditor's report, and to evaluate, as of the end of each fiscal quarter, or year in the case of a foreign private issuer filing its annual report on Form 20–F or Form 40–F,[3] any change in the company's internal control over financial reporting that occurred during the period that has materially affected, or is reasonably likely to materially affect, the company's internal control over financial reporting.

On February 24, 2004, we approved an extension of the original compliance dates for the amendments related to internal control reporting.[4] Specifically, we extended the compliance dates for companies that are accelerated filers, as defined in Rule 12b–2[5] under the Securities Exchange Act of 1934,[6] to fiscal years ending on or after November 15, 2004, and for companies that are not accelerated filers and for foreign private issuers, to fiscal years ending on or after July 15, 2005. We believed that providing additional time for compliance was appropriate in light of both the substantial time and resources needed to properly implement the rules and to provide additional time for companies and their auditors to implement Auditing Standard No. 2, which set forth new standards for conducting an audit of internal control over financial reporting performed in conjunction with an audit of the financial statements.[7]

On March 2, 2005, we approved a further one-year extension of the compliance dates for companies that are not accelerated filers and for foreign private issuers filing annual reports on Form 20–F or 40–F.[8] In granting this relief, we noted that an extension was warranted, in part, in view of the significant effort being expended by many foreign private issuers to begin complying with new International Financial Reporting Standards.[9]

In addition, we thought it was appropriate to provide an additional extension for non-accelerated filers in recognition of other efforts in the market place that might affect the implementation of internal control reporting by smaller companies. For example, at the request of Commission staff, the Committee of Sponsoring Organizations of the Treadway Commission (''COSO'') established a task force to provide more guidance on how the COSO Internal Control-Integrated Framework (the

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[1] *See* Release No. 33–8238 (June 5, 2003) [68 FR 36636].

[2] 15 U.S.C. 7262.

[3] 17 CFR 249.20f and 249.40f.

[4] *See* Release No. 33–8392 (February 24, 2004) [69 FR 9722].

[5] 17 CFR 240.12b–2. An ''accelerated filer'' means an issuer after it first meets the following conditions as of the end of its fiscal year: (i) the aggregate market value of the voting and non-voting common equity held by non-affiliates of the issuer is $75 million or more; (ii) the issuer has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; (iii) the issuer has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and (iv) the issuer is not eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports. In a separate release that we are issuing today, we are proposing to add a definition of ''large accelerated filer'' to Exchange Act Rule 12b–2. If we adopt that proposal, the extension of compliance dates for internal control reports affected by this release would apply to companies, including foreign private issuers, that are neither accelerated filers nor large accelerated filers. *See* Release No. 33–8617 (September 22, 2005).

[6] 15 U.S.C. 78a *et. seq.*

[7] *See* Release No. 34–49884 File No. PCAOB 2004–03 (June 17, 2004) [69 FR 35083]. Auditing Standard No. 2 provides the professional standards and related performance guidance for independent auditors to attest to, and report on, the effectiveness of companies' internal control over financial reporting.

[8] *See* Release No. 33–8545 (March 2, 2005) [70 FR 11528].

[9] In March 2004, we proposed amendments to Form 20–F under the Exchange Act to provide foreign private issuers a one-time accommodation relating to financial statements prepared under the International Financial Reporting Standards. These amendments were adopted in April 2005. *See* Release No. 34–49403 (March 11, 2004) [69 FR 12904] and Release No. 34–51535 (April 12, 2005) [70 FR 20674].

''framework'')[10] can be applied to smaller public companies. Moreover, the Commission organized the Advisory Committee on Smaller Public Companies in March 2005 to examine the impact of the Sarbanes-Oxley Act and other federal securities laws on smaller companies.[11] These efforts were just commencing at the time we approved the extension.

Today we are again extending the dates for complying with our internal control over financial reporting requirements for companies, including foreign private issuers, that are not accelerated filers. The extended compliance period does not in any way alter requirements regarding internal control that are in effect, including, without limitation, Section 13(b)(2) of the Exchange Act[12] and the rules thereunder. In this regard, notwithstanding the deferral of the applicability of the specific requirements of our rules under Section 404 of the Sarbanes-Oxley Act (and also, as a result, the deferral of the applicability of Auditing Standard No. 2 of the Public Company Accounting Oversight Board), non-accelerated filers must continue to assess whether the company's internal accounting controls are sufficient to meet applicable requirements under federal securities laws, and we would expect that officers with responsibility for financial reporting and internal control and audit committees (or in the absence of audit committees, boards of directors) would continue to work together in this area. Moreover, independent auditors of non-accelerated filers must consider filers' internal accounting controls in connection with the conduct of audits of financial statements in accordance with the standards of the Public Company Accounting Oversight Board.[13]

The Commission, for good cause, finds that notice and solicitation of comment regarding extension of the compliance dates is impractical, unnecessary and contrary to the public interest.[14] First, comments regarding current requirements under Section 404, including comments provided at, and in connection with our Roundtable on Implementation of Internal Control Reporting Provisions held on April 13, 2005, raise issues as to whether a broadly accepted or demonstrably suitable framework is currently in place for evaluating internal control at smaller public companies, including non-accelerated filers. As stated above, the Commission staff has sought an enhanced framework for smaller public companies, including by calling on COSO to evaluate its existing framework and possible adjustments, modifications or supplemental guidance for smaller public companies.

We believe that the COSO task force has devoted significant time and effort to this matter and appreciate their contribution in an important area. We also believe, however, that the task has proven challenging and more time-consuming than anticipated. The COSO task force has indicated to the Commission staff that it is approaching the point when an exposure draft will be made available for public comment. Any conclusions are a number of months away.

Second, by that time, significant work will have been done, and significant expenses incurred, by many non-accelerated filers to comply with the existing requirement for their first fiscal year ending on or after July 15, 2006, unless the current compliance date is extended. We believe that only an immediate deferral of the current compliance date can forestall that result. Due to the significant costs that smaller companies are likely to incur to prepare for initial compliance with the internal control requirements, we think that it is critical to make the extension effective as soon as possible so that they have the certainty of knowing that they can rely on it. We believe that many smaller companies already have begun to prepare for compliance with the internal reporting control requirements.[15]

In addition, the Advisory Committee on Smaller Public Companies continues to study the internal control over financial reporting requirements for smaller public companies and is scheduled to complete its work by April 2006. In the interim, the Advisory Committee recently has recommended that the Commission further extend the compliance date for companies that are not accelerated filers.[16]

The Commission further notes that many accelerated filers who became subject to the internal control over financial reporting requirements for the first time this year had difficulty filing their Form 10–K annual reports on time.[17] Moreover, several of the responses that we received from accelerated filers in connection with our internal control roundtable indicated that many of the costs that they incurred in the initial year of compliance would not be recurring costs; they expected the internal control reporting process to become more efficient and less costly in subsequent years. Companies that are not accelerated filers may be able to benefit from the experiences of accelerated filers in the second year of compliance with the internal control reporting requirements as best practices emerge and increased efficiencies are realized. Finally, the Commission notes that the overwhelming majority of market capitalization of U.S. public companies is subject to our requirements under Section 404 notwithstanding this deferral. On the basis of the foregoing, for good cause and because the extension will relieve a

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[10] Under Commission rules, a reporting company is required to use a suitable, recognized control framework that is established by a body or group that has followed due-process procedures, such as the COSO Framework, to assess the effectiveness of the company's internal control over financial reporting. *See* Exchange Act Rules 13a–15(c) and 15d–15(c) [17 CFR 240.13a–15(c) and 240.15d–15(c)].

[11] *See* SEC Press Release 2004–174 (December 16, 2004) and Release No. 33–8514 (December 16, 2004) [69 FR 76498]. The Advisory Committee held its first meeting on April 12, 2005.

[12] 15 U.S.C. 78m(b)(2).

[13] *See* Auditing Standards Board, AICPA, Statement on Auditing Standards No. 78, *Consideration of Internal Control in a Financial Statement Audit: An Amendment to Statement on Auditing Standards No. 55 (1995)*, adopted by the PCAOB in Rule 3200T, *Interim Auditing Standards*, and as amended by the PCAOB on September 15, 2004 in *Conforming Amendments to PCAOB Interim Standards Resulting From the Adoption of PCAOB Auditing Standard No. 2, ''An Audit of Internal Control Over Financial Reporting Performed in Conjunction With an Audit of Financial Statements*.''

[14] *See* Section 553(b)(3)(B) of the Administrative Procedure Act [5 U.S.C. 553(b)(3)(B)] (stating that an agency may dispense with prior notice and comment when it finds, for good cause, that notice and comment are ''impracticable, unnecessary, or contrary to the public interest.'').

[15] See, for example, the statement of William A. Loving, Jr., Executive Vice President and Chief Executive Officer of Pendleton County Bank that he submitted on behalf of the Independent Community Bankers of America. In his statement, Mr. Loving indicated that his bank already has spent approximately $40,000 in consultancy and outside vendor costs, $10,000 in training and education, and 160 staff hours to comply with Sarbanes-Oxley Act requirements. It anticipated incurring an additional 1,600 staff hours to prepare for compliance with the internal control requirements. Mr. Loving estimated the costs of the testing alone to be $50,000, not including internal staffing costs and additional external audit costs. Mr. Loving's statement is available at: *http://www.sec.gov/rules/other/265–23/icba060805.pdf*.

[16] On August 10, 2005, the Advisory Committee adopted a resolution recommending that the Commission extend the compliance dates of the internal control reporting requirements for companies that are not accelerated filers. The Advisory Committee is of the opinion that there is overall consensus and widely-held support for its recommendation and suggested that we implement it as soon as possible. *See* The Advisory Committee's Letter to Securities and Exchange Commission Chairman Christopher Cox, dated August 18, 2005.

[17] During the first 11 months of the Commission's current fiscal year which ends on September 30, 2005, we received 2,320 notifications of late Form 10–K filings on Form 12b–25. This represented a 13% increase over the total number of similar notifications that we received during all of our 2004 fiscal year.

restriction, the extension will be effective on September 29, 2005.

To assist us in our ongoing consideration of Section 404 of the Sarbanes-Oxley Act in the context of smaller public companies, we are including a list of questions below to solicit public comment on some substantive issues regarding the application of our internal control over financial reporting requirements to these companies. We also are soliciting public comment on the amount of time and expense that companies that are not accelerated filers have incurred to date to prepare for compliance with the internal control reporting requirements. These comments will assist us in any future proposals regarding our rules under Section 404. We would expect to provide formal notice and an additional opportunity for public comment on any such proposals.

In this regard, we note that the Advisory Committee recently also has solicited public input on a range of issues related to the current securities regulatory system for smaller companies, including the impact on smaller public companies of the internal control reporting requirements mandated by Section 404 of the Sarbanes-Oxley Act of 2002. In formulating any possible proposed revisions to the internal control reporting requirements that would affect smaller reporting companies, we intend to consider relevant recommendations made to the Commission by the Advisory Committee.

**Request for Comment**

- Should there be a different set of internal control over financial reporting requirements that applies to smaller companies than applies to larger companies? Would it be appropriate to apply a different set of substantive requirements to non-accelerated filers, or for management of non-accelerated filers to make a different kind of assessment? Why or why not? If you think that there should be a different set of requirements for companies that are not accelerated filers, what should those requirements be? What would be the impact of any such differences in the requirements on investors?
- Would a public float threshold that is higher or lower than the $75 million threshold that we use to distinguish accelerated filers from non-accelerated filers be more appropriate for this purpose? If so, what should the threshold be and why? Would it be better to use a test other than public float for this purpose, such as annual revenues, number of segments or number of locations or operations? If so, why?
- Should the independent auditor attestation requirements be different for smaller public companies? If so, how should the requirements differ?
- Should the same standard for auditing internal control over financial reporting apply to auditors of all public companies, or should there be different standards based on the size of the public company whose internal control is being audited? If the latter, how should the standards differ?
- How can we best assure that the costs of the internal control over financial reporting requirements imposed on smaller public companies are commensurate with the benefits?
- We solicit comment describing the actions that non-accelerated filers already have taken to prepare for compliance with the internal control over financial reporting requirements. Specific time and cost estimates would be particularly helpful. We also would be interested in receiving additional information about the compliance burdens incurred this year by smaller accelerated filers that included internal control reports in their Form 10–K annual reports.

Dated: September 22, 2005.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 05–19426 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–U**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 101

**[Docket Nos. 1991N–0384H and 1996P–0500] (formerly 91N–384H and 96P–0500)**

**RIN 910–AC49**

## Food Labeling; Nutrient Content Claims, Definition of Sodium Levels for the Term ''Healthy''

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending its regulations concerning the maximum sodium levels permitted for foods that bear the implied nutrient content claim ''healthy.'' The agency is retaining the currently effective, less restrictive, ''first-tier'' sodium level requirements for all food categories, including individual foods (480 milligrams (mg)) and meals and main dishes (600 mg), and is dropping the ''second-tier'' (more restrictive) sodium level requirements for all food categories. Based on the comments received about technological barriers to reducing sodium in processed foods and poor sales of products that meet the second-tier sodium level, the agency has determined that requiring the more restrictive sodium levels would likely inhibit the development of new ''healthy'' food products and risk substantially eliminating existing ''healthy'' products from the marketplace. After reviewing the comments and evaluating the data from various sources, FDA has become convinced that retaining the higher first-tier sodium level requirements for all food products bearing the term ''healthy'' will encourage the manufacture of a greater number of products that are consistent with dietary guidelines for a variety of nutrients. The agency has also revised the regulatory text of the ''healthy'' regulation to clarify the scope and meaning of the regulation and to reformat the nutrient content requirements for ''healthy'' into a more readable set of tables, consistent with the Presidential Memorandum instructing that regulations be written in plain language.

**DATES:** This final rule is effective September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Constance Henry, Center for Food Safety and Applied Nutrition (HFS–832), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1450.

**SUPPLEMENTARY INFORMATION:**

### I. Background

In the **Federal Register** of May 10, 1994 (59 FR 24232), FDA published a final rule amending § 101.65 (21 CFR 101.65) to define the term ''healthy'' as an implied nutrient content claim under section 403(r) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 343(r)). The 1994 final rule defined criteria for use of the implied nutrient content claim ''healthy'' and its derivatives (e.g., ''health'' and ''healthful'') on individual foods, including raw, single-ingredient seafood and game meat, and on meal and main dish products. It also established two separate timeframes in which different criteria for sodium content would be effective for foods bearing a ''healthy'' claim (i.e., before January 1, 1998, and after January 1, 1998).

According to the 1994 final rule, before January 1, 1998, individual foods

could bear the term ''healthy'' or a related term if the food contained no more than 480 mg of sodium (first-tier sodium level) per reference amount customarily consumed (RACC or reference amount), per labeled serving (LS) (serving size listed in the nutrition information panel of the packaged product), and if the reference amount was small (i.e., 30 grams (g) or less or 2 tablespoons or less), per 50 g (§ 101.65(d)(2)(ii)(A) and (d)(2)(ii)(B) and (d)(3)(ii)(A) and (d)(3)(ii)(B)). After January 1, 1998, an individual food could bear the term ''healthy'' or a related term if it contained 360 mg or less of sodium (second-tier sodium level) per reference amount, per labeled serving and per 50 g if the reference amount was small (§ 101.65(d)(2)(ii)(C) and (d)(3)(ii)(C)). The agency derived this 360 mg sodium level by applying a 25 percent reduction to the original sodium disclosure level of 480 mg for individual foods (59 FR 24232 at 24240).[1]

Similarly, before January 1, 1998, meal and main dish products could bear the term ''healthy'' or a related term if they contained no more than 600 mg of sodium (first-tier sodium level) per labeled serving (§ 101.65(d)(4)(ii)(A)), and after January 1, 1998, no more than 480 mg of sodium per labeled serving (second-tier sodium level) (§ 101.65(d)(4)(ii)(B)). The agency selected the 480 mg sodium level because it was low enough to assist consumers in meeting dietary goals, while simultaneously giving consumers who eat such foods the flexibility to consume other foods whose sodium content is not restricted; because there were many individual foods and meal-type products on the market that contained less than 600 mg of sodium; and because comments suggesting other levels did not provide supporting data (59 FR 24232 at 24240). Higher levels of sodium were rejected in the 1994 final rule (59 FR 24232 at 24239) because the agency determined that higher levels would not be useful to consumers wanting to use foods labeled as ''healthy'' to limit their sodium intake in order to achieve current dietary recommendations.

On December 13, 1996, FDA received a petition from ConAgra, Inc., (the petitioner) requesting that the agency amend § 101.65(d) to ''eliminate the sliding scale sodium requirement for foods labeled 'healthy' by eliminating the entire second tier levels of 360 mg sodium for individual foods and 480 mg sodium for meals and main dishes'' (FDA Docket No. 96P–0500/CP1, p. 3). As an alternative, the petitioner requested that the January 1, 1998, effective date for the second-tier sodium levels be delayed until such time as food technology ''catches up'' with FDA's goal of reducing the sodium content of foods and there is a better understanding of the relationship between sodium and hypertension.

FDA responded to ConAgra's petition in the **Federal Register** of April 1, 1997 (62 FR 15390), by announcing a partial stay of the second-tier sodium levels in § 101.65(d)(2)(ii)(C) and (d)(4)(ii)(B) until January 1, 2000. The stay was intended to allow time for FDA to reevaluate the second-tier sodium levels based on the data contained in the petition and any additional data that the agency might receive; to conduct any necessary rulemaking; and to give industry an opportunity to respond to the rule or to any changes in the rule that might result from the agency's reevaluation.

On December 30, 1997 (62 FR 67771), FDA published an advance notice of proposed rulemaking (ANPRM) announcing that it was considering whether to initiate rulemaking to reevaluate and possibly amend the implied nutrient content claims regulations pertaining to the use of the term ''healthy'' (the 1997 AMPRM).

In the **Federal Register** of March 16, 1999 (64 FR 12886), FDA published a final rule extending the partial stay of the second-tier sodium requirements in § 101.65 until January 1, 2003. The agency noted that it took this action to provide time for the following: (1) FDA to reevaluate the supporting and opposing information received in response to the ConAgra petition, (2) the agency to conduct any necessary rulemaking on the sodium limits for the term ''healthy,'' and (3) companies to respond to any changes that may result from agency rulemaking. On May 8, 2002 (67 FR 30795), FDA issued another final rule to extend the partial stay of the second tier sodium requirements in § 101.65 until January 1, 2006.

While the partial stay was pending, the U.S. Department of Agriculture (USDA) and the Department of Health and Human Services (HHS) jointly published the ''Dietary Guidelines for Americans 2000'' (Ref. 1). This report provides recommendations for nutrition and dietary guidelines for the general public and suggests a diet with moderate sodium intake, not exceeding 2,400 mg per day. The health concerns relating to high salt intake are high blood pressure and loss of calcium from bones, which may lead to risk of osteoporosis and bone fractures (Ref. 1).

On February 20, 2003, FDA published a proposed rule (68 FR 8163) to amend the ''healthy'' regulation by retaining the current, less restrictive first-tier sodium level of 600 mg for meals and main dish products while permitting the more restrictive second-tier level of 360 mg for individual foods to take effect when the partial stay expired (the 2003 proposed rule). The agency also proposed to revise the regulatory text for the definition of ''healthy'' to clarify the scope and meaning of the regulation and to convert the nutrient content requirements for ''healthy'' to a more readable table-based format, consistent with the Presidential Memorandum instructing Federal agencies to use plain language.

## II. Summary of the Final Rule

As proposed, this final rule amends the ''healthy'' definition in § 101.65(d) by eliminating the second-tier, more restrictive sodium requirement (480 mg) for meal and main dish products, which had been stayed until January 1, 2006. The final rule also eliminates the second-tier sodium requirement for individual foods instead of allowing it to go into effect on January 1, 2006, as proposed. Consequently, neither second-tier sodium requirement will take effect when the stay expires on January 1, 2006, and the sodium requirements for products labeled as ''healthy'' will remain at the current first-tier levels of 600 mg of sodium for meal and main dish products and 480 mg of sodium for individual food products. As proposed, the final rule also revises the regulatory text for the definition of ''healthy'' to clarify the scope and meaning of the regulation and to convert the nutrient content requirements for ''healthy'' to a more readable table-based format.

As discussed in section III of this document, this action is being taken as a result of comments from a variety of stakeholders urging FDA to eliminate the more restrictive sodium requirements for individual foods as well as for meal and main dish products. The comments documented substantial technical difficulties in

[1] Under § 101.13(h)(1) (21 CFR 101.13(h)(1)), individual foods bearing a nutrient content claim and containing more than 480 mg sodium per reference amount, per labeled serving or per 50 g (if the reference amount is small—i.e., 30 g or less or 2 tablespoons or less), must bear a label statement referring consumers to information about the amount of sodium in the food. Such disclosure statements are required when a food contains more than a certain amount of total fat, saturated fat, sodium, or cholesterol and that food bears a nutrient content claim. (See section 403(r)(2)(B) of the act.) The agency developed disclosure levels based on dietary guidelines, and taking into account the significance of the food in the total daily diet, based on daily reference values for total fat, saturated fat, cholesterol, and sodium (58 FR 2302 at 2307, January 6, 1993).

finding suitable alternatives for sodium and demonstrated the lack of consumer acceptance of certain ''healthy'' products made with salt substitutes and/or lower sodium. Comments from both industry and consumer advocates support the conclusion that implementing the second-tier sodium requirements would risk substantially eliminating existing ''healthy'' products from the marketplace because of unattainable nutrient requirements or undesirable and, thus, unmarketable flavor profiles. As a result of these comments, FDA has concluded that it can best serve the public health by continuing to permit products that meet the first-tier sodium level to be labeled as ''healthy,'' and thereby ensure the continued availability of foods that consumers can rely on to help them follow dietary guidelines not only for controlling sodium but also for limiting total fat, saturated fat, and cholesterol and consuming adequate amounts of important nutrients such as fiber, protein, and key vitamins and minerals.

## III. Summary of Comments from the Proposed Rule

FDA received a total of 18 responses, each containing one or more comments, to the 2003 proposed rule. Of these comments, 5 were about topics other than the nutrient content claim ''healthy'' and are not considered here because they are outside the scope of this rulemaking. The remaining comments were from consumers, industry, a trade association, health and nutrition scientists and organizations, and consumer groups. The majority of the comments took the view that the more restrictive second-tier requirements for both the meal and main dish category and individual foods category should be revoked. The comments are discussed in detail in this section of the document.

To make it easier to identify comments and FDA's responses to the comments, the word ''Comment'' will appear in parentheses before the description of the comment, and the word ''Response'' will appear in parentheses before FDA's response. FDA has also numbered each comment to make it easier to identify a particular comment. The number assigned to each comment is purely for organizational purposes and does not signify the comment's value or importance or the order in which it was submitted.

### *A. Sodium and Hypertension*

(Comment 1) Several comments agreed that there is a problem with high blood pressure in the United States, citing statistics showing that 40 million people in this country are hypertensive and that an additional 45 million people are prehypertensive. Most of these comments further agreed that excess sodium in the diet is a primary cause of the incidence of high blood pressure in the United States. Comments pointed out that for two decades the National Institutes of Health's (NIH) National Heart Lung and Blood Institute (NHLBI) has recommended that Americans cut back on their sodium consumption while eating a diet high in fruits and vegetables, low-fat dairy products and limited in saturated and total fat (the DASH diet). Some comments, including comments from a consumer advocacy group and health advocacy groups, stated that it was indisputable that reducing sodium would lower blood pressure.

One comment maintained that there was no evidence that restricting sodium consumption will result in improved cardiovascular health outcomes. This comment criticized FDA's reliance on studies examining the intermediate variables associated with salt intake, such as changes in blood pressure, maintaining that the agency should instead focus on whether restricting sodium consumption will result in improved cardiovascular health outcomes. According to this comment, none of the nine studies reported since 1995 that examined health outcomes associated with reduced dietary sodium showed a benefit to the general population in terms of health outcomes such as reduced incidence of heart attacks and strokes; in fact, some studies actually found a connection between low sodium diets and adverse health outcomes, i.e., a greater incidence of heart attacks. Another comment pointed out that too little sodium can actually be harmful, especially for people with low blood pressure and those living in hot climates. A few of the comments suggested that the NIH/NHLBI study ''Dietary Approaches to Stop Hypertension—Sodium,'' known as the DASH-Sodium study, should be examined more closely before the agency comes to any conclusion about the need to reduce sodium in foods.[2] As discussed in detail under comment 2 of this document, one comment questioned the accuracy and objectivity of this study, whose reported conclusions were that both hypertensive and nonhypertensive individuals can lower blood pressure by reducing dietary sodium.

Other comments expressed concern about the lack of scientific data to support changes in the sodium level for ''healthy,'' stating that the commenters were not aware of any studies showing improved health outcomes with reductions of 120 mg of sodium for individual foods. Another comment stated that the commenter was not aware of any scientific research since 1997 that increased concerns about the sodium content of foods or that showed a need for a 25 percent reduction in sodium to ensure consumer health. Still other comments suggested that before making its decision, the agency should await the outcome of the Institute of Medicine (IOM), National Academy of Science's (NAS) report on Dietary Reference Intakes for Water, Potassium, Sodium, Chloride, and Sulfate (The Electrolyte Report) (Ref. 2), possible revisions of the Dietary Guidelines for Americans, 2000 and Food Guide Pyramid, as well as the DASH-Sodium study, in the hope that examination of the issue through these deliberative processes would shed more light on the matter.

(Response) The effects of sodium on blood pressure are well documented. The IOM has recently completed its in-depth evaluation of a variety of electrolytes and established dietary reference intakes (DRI's) for these nutrients. The other scientific studies and evaluations mentioned in comments (the DASH-Sodium study and revisions of the Dietary Guidelines for Americans, 2000 and Food Guide Pyramid) have also been completed. The IOM's most recent evaluation of the role of sodium is summed up in its 2004 report (The Electrolyte Report) (Ref. 2). The Summary section of the Sodium and Chloride chapter of the Electrolyte Report states in part:

> The major adverse effect of increased sodium chloride intake is elevated blood pressure, which has been shown to be an etiologically related risk factor for cardiovascular and renal diseases. On average, blood pressure rises progressively with increased sodium chloride intake. The dose-dependent rise in blood pressure appears to occur throughout the spectrum of sodium intake. However, the relationship is non-linear in that blood pressure response to changes in sodium intake is greater at sodium intakes below 2.3 g (100 mmol) per day than above this level. The strongest dose-response evidence comes from those clinical trials that specifically examined the effects of at least 3 levels of sodium intake on blood pressure. The range of sodium intake in these studies

[2] The primary objective of the DASH-Sodium trial was to test the effects of two dietary patterns (a control diet and the DASH diet) and three sodium intake levels on blood pressure in adult men and women with blood pressure higher than optimal or at stage 1 hypertension (systolic 120–159 (millimeters of mercury (mm Hg) and diastolic 80–95 mm Hg). The DASH diet is rich in fruits, vegetables, and low fat dairy products and reduced in saturated and total fat. Consequently, it is rich in potassium, magnesium, and calcium.

varied from 0.23 g (10 mmol) per day to 34.5 g (1,500 mmol) per day. Several trials included sodium intake levels close to 1.5 g (65 mmol) per day and 2.3 g/day (100 mmol/day).

While blood pressure, on average, rises with increased sodium intake, there is well recognized heterogeneity in the blood pressure response to changes in sodium chloride intake. Individuals with hypertension, diabetes, and chronic kidney diseases, as well as older-age persons and African Americans, tend to be more sensitive to the blood pressure raising effects of sodium chloride intake than their counterparts. Genetic factors also influence the blood pressure response to sodium chloride. There is considerable evidence that salt sensitivity is modifiable. The rise in blood pressure from increased sodium chloride intake is blunted in the setting of a diet high in potassium or that is low in fat, and rich in minerals; nonetheless, a dose-response relationship between sodium intake and blood pressure still persists. In non-hypertensive individuals, a reduced salt intake can decrease the risk of developing hypertension (typically defined as a systolic blood pressure ≥ 140 mm Hg or a diastolic blood pressure ≥ 90 mm Hg).

The adverse effects of higher levels of sodium intake on blood pressure provide the scientific rationale for setting the Tolerable Upper Intake Level (UL). Because the relationship between sodium intake and blood pressure is progressive and continuous without an apparent threshold, it is difficult to precisely set a UL, especially because other environmental factors (weight, exercise, potassium intake, dietary pattern and alcohol intake) and genetic factors also affect blood pressure. For adults, a UL of 2.3 g (100 mmol) per day is set. In dose-response trials, this level was commonly the next level above the AI [Adequate Intake] that was tested. It should be noted that the UL is not a recommended intake and, as with other ULs, there is no benefit to consuming levels above the AI. Among certain groups of individuals who are most sensitive to the blood pressure effects of increased sodium intake (e.g., older persons, African Americans, and individuals with hypertension, diabetes, or chronic kidney disease), their UL may well be lower. These groups also experience an especially high incidence of blood pressure-related cardiovascular disease. * * *

It is well-recognized that the current intake of sodium for most individuals in the United States and Canada greatly exceeds both the AI and UL.

(The Electrolyte Report, pp. 270–272 (footnote omitted).)

The IOM also looked at cardiovascular disease and high blood pressure. Page 323 of the Electrolyte Report states that ''[d]ata from numerous observational studies provide persuasive evidence of the direct relationship between blood pressure and cardiovascular disease,'' citing a recent meta-analysis (Lewington et al., 2002) of 60 prospective observational studies with almost 1 million enrolled adults. Individuals with preexisting vascular disease were excluded. With 12.7 million person years of followup and the total number of deaths at 122,716, about half of the deaths in these studies occurred as a result of cardiovascular disease (11,960 deaths from stroke, 34,283 from ischemic heart disease, and 10,092 deaths from other vascular causes). The IOM further commented (pp. 324–325):

[S]troke mortality progressively increased with systolic blood pressure * * * and diastolic blood pressure * * * in each decade of life. Similar patterns were evident for mortality from ischemic heart disease and from other vascular diseases. In analyses that involved time-dependent correction for regression-dilution bias, there were strong, direct relationships between blood pressure and each type of vascular mortality. Importantly, there was no evidence of a blood pressure threshold—that is, vascular mortality increased throughout the range of blood pressures, in both non-hypertensive and hypertensive individuals.

The IOM also looked at the effects of reduced sodium intake on blood pressure using evidence from intervention studies in both nonhypertensive and hypertensive individuals (page 329). Although the studies differed in size (<10 to > 500 persons), duration (range 3 days to 3 years), extent of sodium reductions, background diet (e.g., intake of potassium), study quality and documentation, the studies provided relatively consistent evidence that a reduced intake of sodium lowers blood pressure in both hypertensive and nonhypertensive adults. In these intervention trials, the extent of blood pressure reduction from a lower intake of sodium in hypertensive participants was more pronounced than that observed in nonhypertensive participants. (See The Electrolyte Report, Tables 6–12 and 6–13.)

The NIH/NHLBI DASH-Sodium study tested the effects of two dietary patterns (a control diet and the DASH diet described previously) and three sodium intake levels on blood pressure in adult men and women with blood pressure higher than optimal or at stage 1 hypertension. The overall blood pressure range for the study was systolic 120–159 mm Hg and diastolic 80–95 mm Hg. The reported conclusions of the DASH-Sodium study were that both hypertensive and nonhypertensive individuals can lower blood pressure by reducing dietary sodium. These conclusions were generally consistent with those of the other intervention studies, showing a connection between reduced sodium intake and lowered blood pressure in both hypertensive and nonhypertensive subjects, with a greater effect observed in the hypertensive subjects.

The IOM considered the DASH-Sodium trial in the Electrolyte Report, which describes the results of the subgroup analysis as follows:

On the control diet, significant blood pressure reduction was evident in each subgroup. Reduced sodium intake led to greater systolic blood pressure reduction in individuals with hypertension compared with those classified as non-hypertensive, African Americans compared with non-African Americans, and older individuals (> 45 years old compared with those ≤ 45 years old). On the DASH diet, a qualitatively similar pattern was evident; however, some sub-group analyses did not achieve statistical significance, perhaps as a result of small sample size. Comparing the combined effect of the DASH diet with lower sodium with the control diet with higher sodium, the DASH diet with lower sodium reduced systolic blood pressure by 7.1 mm HG in non-hypertensive persons and by 11.5 mm Hg in individuals with hypertension.

(The Electrolyte Report, p. 347.)

The DASH-Sodium study and the other studies summarized in The Electrolyte Report, as evaluated by the IOM, demonstrate that the intake of excess sodium in the diet is indeed a public health issue. FDA further agrees with the IOM's recommendations for addressing this issue:

It is well-recognized that the current intake of sodium for most individuals in the United States and Canada greatly exceeds both the AI and the Tolerable Upper Intake Level (UL). Progress in achieving a reduced sodium intake will be challenging and will likely be incremental. Changes in individual behavior towards salt consumption will be required as will replacement of higher salt foods with lower salt versions. This will require increased collaboration of the food industry with public health officials, and a broad spectrum of additional research. The latter includes research designed to develop reduced sodium food products that maintain flavor, texture, consumer acceptability, and low cost. Such efforts will require the collaboration of food scientists, food manufacturers, behavioral scientists, and public health officials.

(The Electrolyte Report, pp. 395–396.)

Consequently, the agency continues to believe that individuals should be encouraged to reduce the amount of sodium in their diets and that manufacturers should be encouraged to produce sodium controlled products which are palatable and otherwise acceptable to consumers.

Further, the recently published ''Dietary Guidelines for Americans 2005'' (Ref. 3), recommends that individuals consume less than 2,300 mg (approximately 1 teaspoon (tsp) of salt) of sodium per day. This is a decrease of 100 mg from FDA's sodium Daily Value of 2,400 mg (§ 109.9(c)(9) (21 CFR

101.9(c)(9))) which was cited in the 2000 Dietary Guidelines.

The new USDA pyramid (*http://www.mypyramid.gov*) (Ref. 4) encourages consumers to use the Nutrition Facts label to determine the amount of sodium in processed foods, particularly meats and canned vegetables, and to keep sodium consumption below 2,300 mg per day by looking for lower sodium foods. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

(Comment 2) One comment argued that FDA should delay consideration of the 2003 proposed rule until the NHLBI of NIH responds to a joint request for correction filed by the Salt Institute and the U.S. Chamber of Commerce under the Information Quality Act (IQA) (Public Law 106–554, H.R. 5658, § 515, 114 Stat. 2763, 2763A–153 to -154 (2000)), and NIH Information Quality Guidelines, *http://aspe.hhs.gov/infoquality/Guidelines/NIHinfo2.shtml*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.) This comment questioned the accuracy and objectivity of NHLBI's conclusion, based on the DASH-Sodium study, that all segments of the population can lower their blood pressure by reducing sodium intake. The comment argued that because not all of the data from the DASH-Sodium study were made available for review by interested parties and therefore could not be evaluated and validated by others, FDA should defer consideration of the study until the data are released and any necessary reexamination of NHLBI's conclusions about sodium intake and blood pressure has been accomplished. A second comment similarly argued that FDA should not consider the DASH-Sodium study or any other studies ''until such time that they are in accord with the [IQA].''

(Response) Under the IQA, affected persons must be afforded an administrative mechanism through which they may seek and obtain correction of information disseminated by Federal agencies (Public Law 106–554, H.R. 5658, § 515(b)(1)(B)). The joint Salt Institute—Chamber of Commerce request for correction asked NIH to make publicly available the DASH-Sodium data for all study subgroups, but did not ask NIH to withdraw or correct any of its public statements recommending that consumers reduce sodium intake to lower blood pressure, which relied on the DASH-Sodium data. At the time the comments were filed, NIH had not yet responded to the joint IQA request for correction. NIH denied the request by letter on August 19, 2003 (Ref. 5). See *http://aspe.hhs.gov/infoquality/request&response/reply_8b.shtml*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.) The NIH response informed the requesters that the appropriate mechanism to request access to data produced in grant-funded research such as the DASH-Sodium study is a request for government records under the Freedom of Information Act rather than a request for correction under the IQA; however, the response also stated that NHLBI's public statements about sodium intake and blood pressure satisfied NIH's information quality standards, pointing out that both the DASH-Sodium study itself and NHLBI's public statements based on it had been subjected to thorough multiple rounds of review, including peer review, and that the DASH-Sodium study was only one piece of evidence in a substantial, cumulative body of evidence that shows a clear causal relationship between sodium intake and blood pressure.

The Salt Institute and Chamber of Commerce requested reconsideration of the request for correction. NIH's response (Ref. 6) (see *http://aspe.hhs.gov/infoquality/request&response/8d.shtml*) affirmed the denial of the original request and gave additional reasons why NHLBI's public statements about sodium intake and blood pressure complied with the NIH Information Quality Guidelines. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.) The Salt Institute and Chamber of Commerce then sued NIH in the U.S. District Court for the Eastern District of Virginia, alleging that NIH had violated the IQA by failing to disclose the data and methods underlying the DASH-Sodium study. The court dismissed the case, ruling that an agency response to a request for correction under the IQA is not subject to judicial review. (*Salt Institute* v. *Thompson*, 345 F. Supp.2d 589 (E.D. Va. 2004), appeal docketed, No. 05–1097 (4th Cir. Jan. 25, 2005).) Although an appeal of that ruling is pending, FDA does not believe that further delay in issuing a final rule is justified by the pendency of this appeal.

FDA is relying on a large and well-established body of evidence about sodium and hypertension summarized in The Electrolyte Report, not solely on the DASH-Sodium study or NHLBI's conclusions about that study expressed in its public statements. Further, as discussed in response to comment 1 of this document, the IOM's conclusions about the DASH-Sodium study data are consistent with those of NHLBI. For the reasons discussed in NHLBI's responses to the IQA request for correction and request for reconsideration (Refs. 5 and 6), FDA is satisfied that the data that were the subject of the IQA request for correction submitted to NHLBI, as well as the other data on sodium and blood pressure considered in this rulemaking, are objective and reliable.

*B. Public Health Goals*

(Comment 3) Comments said that the ''healthy'' claim should be used to promote development of foods that are indeed more healthful and to encourage consumers to eat such foods. A number of comments cited the Secretary of Health and Human Services' statement that food companies should be encouraged and rewarded for creating healthy products. They also said that FDA should develop criteria that would allow for a sufficient number and variety of ''healthy'' products yet would be stringent enough for these products to fit within dietary guidelines.

Many comments expressed concern that making the requirements for use of the term ''healthy'' too stringent will run counter to public health goals. These comments contended that the lower (second-tier) sodium levels will decrease the incentive to develop healthy foods because fewer foods will be able to meet these levels and still be palatable. They argued that products that can currently meet the ''healthy'' first-tier criteria for sodium are better nutritionally than products that do not bear the ''healthy'' claim and are therefore not required to meet any of the various nutrient requirements for ''healthy''. Consequently, the comments said, it is better overall to allow the currently marketed ''healthy'' products with slightly higher sodium content to continue to bear the term ''healthy'' than to implement the more restrictive sodium requirement and risk losing these nutrient controlled products altogether. Comments argued that if consumers are disinclined to eat ''healthy'' foods at the current first-tier sodium levels, they will be even less likely to eat similar foods at the lower sodium levels, thus eliminating many ''good-for-you'' products. However, another comment argued in favor of implementing the second-tier levels, stating that food manufacturers did not reformulate their products to reduce

levels of other nutrients whose consumption should be controlled until nutrient content claim regulations forced industry to lower the levels to use such claims.

Several comments argued that, instead of focusing narrowly on reducing the sodium content of foods with ''healthy'' claims, the agency should direct its efforts toward higher-impact public health measures such as reducing the overall level of sodium in the food supply and fighting obesity. Several comments pointed out that the Surgeon General has targeted obesity and educating people about eating a balanced diet as current U.S. health goals. They said that focusing limited resources on lowering sodium levels in foods labeled as ''healthy'' appears to be out of touch with these goals. These comments suggested that the best way to combat high blood pressure is by offering a reasonable level and balance of all nutrients in foods that tempt the palate. Implementing the second-tier sodium levels, they said, will do the opposite.

(Response) The agency agrees with the comments that it is important that consumers be encouraged to consume foods that will help them achieve a healthy diet. The agency views the ''healthy'' claim as a valuable signal that a food that bears the claim is consistent with dietary guidelines in that it meets a very strict set of nutrient requirements. Such a food must be low in fat and saturated fat (or extra lean), have limited amounts of cholesterol and sodium, but contain a sufficient amount (10 percent of the Daily Value) of at least one of several desirable nutrients. The agency believes that it is important to keep the term ''healthy'' as a viable tool to signal these desirable nutrient characteristics.

The intent of the two-tiered sodium levels established by the 1994 final rule was to encourage industry to be innovative and further lower sodium levels in foods bearing the term ''healthy''. However, based on comments and other data that have become available since 1994, FDA is concerned that this goal will not be realized and that implementing the second-tier sodium level requirements for the ''healthy'' claim could in fact result in a smaller selection of nutritionally desirable foods on the market. The agency agrees with the majority of comments that lowering the amount of sodium in ''healthy'' foods to the second-tier levels would run counter to public health goals if it discouraged manufacturers from producing ''healthy'' foods and consumers from eating them.

With regard to the comments that expressed concern about whether the problem of obesity in the United States is being effectively addressed, FDA and its parent agency, HHS, are actively working to confront this public health problem. FDA's plan of action for tackling obesity, which encompasses consumer education, rulemaking to make food labels more useful for people who are trying to lose weight, enforcement against products with misleading serving sizes or unsubstantiated weight loss claims, and research and education partnerships with other government agencies and organizations, is described in ''Calories Count: Report of the Working Group on Obesity'' March 12, 2004 (Ref. 7) (*http://www.cfsan.fda.gov/~dms/owg-toc.html*).

*C. Consumer Understanding*

(Comment 4) Several comments expressed confusion about the current regulations for the term ''healthy''. A couple of comments stated that consumers and food manufacturers do not understand the requirements for using the ''healthy'' claim in food labeling. Comments suggested that food labeling can mislead consumers and FDA about the nutritional value of food and asked FDA to address this problem. One comment from a consumer remarked that the term ''healthy'' is abused, misused, and misunderstood on all sides and that there should be a well publicized chart showing which foods qualify for the term. This comment added that manufacturers believe that only fat and cholesterol content are pertinent criteria; this comment questioned whether many ''healthy'' products actually meet all the ''healthy'' criteria.

(Response) FDA's nutritional criteria for foods that bear a nutrient content claim ensure that such foods are consistent with the dietary guidelines regarding the nutrient that is the subject of the claim. Because ''healthy'' is an implied nutrient content claim (versus an explicit nutrient content claim such as ''low fat''), the desirable nutrient characteristics of a food bearing this claim are less apparent to consumers. Nevertheless, the agency believes that the nutrient content claim ''healthy'' does send a clear message to the consumer that the food is consistent with dietary guidelines and can be used as part of a healthy diet. The definition for ''healthy'' as well as other nutrient content claims can be easily found on the FDA Web site by searching on the word ''definition'' preceded by the word ''nutrient'' or the term(s) used in the claim. In response to the comment asking FDA to publicize the requirements for ''healthy'' claims, the agency has added a direct link to the ''healthy'' definition, which may be accessed by clicking on ''healthy'' in the drop down ''Select a Topic-Labeling'' menu on the Food Labeling and Nutrition page of the FDA Center for Food Safety and Applied Nutrition (CFSAN) Web site (*http://www.cfsan.fda.gov/label.html*). Finally, the agency has done considerable nutrition outreach, including outreach about requirements for the ''healthy'' claim and various other nutrient content claims.

The agency does not agree that manufacturers are unaware of the definition of the ''healthy'' claim, as the definitions of this and other nutrient content claims are readily available to industry, and manufacturers are required to know the laws and regulations that apply to products they market. As with any nutrient content claim, any food labeled as ''healthy'' that deviates from the requirements in the regulation defining that term (§ 101.65(d)) is subject to enforcement proceedings under the act.

*D. Role of Salt in Manufacturing*

(Comment 5) Many comments, particularly from industry, emphasized salt's importance as a food ingredient. They stated that salt is essential for developing taste, and sometimes also for texture and microbiological stability. The comments said that no single substitute for the technical functions of salt was likely to be available soon. One comment explained that the tongue only recognizes sodium chloride (NaCl) as salty and that this makes creating palatable lower sodium versions of products difficult. An industry comment identified a number of manufacturing and technical issues with lowering the amount of salt in a product to the second-tier level. This comment said that hot dogs fall apart, processed meats have reduced microbial protection and lose their characteristic texture, and consumers will not eat certain products with sodium less than 360 mg because the products do not taste good or do not taste as expected. Several comments argued that because consumers will not buy products that meet the second-tier sodium levels, companies will have to discontinue their ''healthy'' products if the second-tier sodium levels go into effect. As discussed in the response to comment 11 of this document, some comments submitted data to support this argument. One comment stated that FDA recognized that the second-tier levels may be overly restrictive in

soliciting comments in the 1997 ANPRM about the technological feasibility of reducing sodium and on consumer acceptance of products with reduced sodium.

(Response) The agency acknowledges manufacturers' concerns about the technical importance of salt. The agency had anticipated that phasing in the lower second-tier sodium level requirement for the term ''healthy'' would allow the food industry time to develop technically and commercially viable alternatives to salt. Although it is unfortunate that no viable alternative has been found, FDA understands the manufacturing difficulties that are presented by the absence of a suitable substitute for salt and has taken them into consideration in deciding how to regulate the sodium content of foods bearing the ''healthy'' claim.

*E. Number of ''Healthy'' Products on the Market*

(Comment 6) A comment contended that the agency had miscounted the number of products with a ''healthy'' claim in the 2003 proposed rule. The comment asserted that in estimating that there were over 800 products bearing a ''healthy'' claim, the agency had erroneously counted certain products in the Food Labeling and Package Survey (FLAPS) data. Examples cited in the comment included products like chewing gum and sugar substitutes that used the term ''health'' in ingredient warnings, such as warnings that saccharin and phenylalanine are bad for your health; products that did not use the term ''healthy'' as a nutrient content claim; and products that used the ''healthy'' claim illegally. The comment also criticized FDA for using 1999 Information Resources, Inc. (IRI) data[3] as a basis for the proposed rule's estimate of the number of ''healthy'' products on the market, and provided the agency with updated 2003 IRI data.

(Response) The comment is incorrect in suggesting that FDA's estimate that over 800 products bore a healthy claim was derived primarily from examination of the FLAPS data. In deriving this number, the agency looked first to the IRI data, which indicated that at the time the data were collected there were over 800 products bearing a ''healthy'' brand name (Ref. 8). Because the IRI data represented only a sampling of the marketplace and captured only ''healthy'' claims that were part of the product's brand name, the agency then used the FLAPS data to evaluate whether there were additional ''healthy'' claims in the marketplace.

FLAPS is an FDA survey which essentially provides a ''snapshot'' of marketed products. The survey involves purchasing representative products and examining them for a variety of label statements that are recorded in a database. In developing the 2003 proposed rule, FDA examined this database to determine the regulatory classification of label statements from this sample. One example of an additional ''healthy'' claim identified using the FLAPS survey is ''Apple sauce is a delicious and healthy fruit product which contains no fat, very low sodium, and no cholesterol.'' This ''healthy'' claim would not have been captured by the IRI data because it is not part of a brand name. On the basis of this and other claims identified in FDA's analysis of the data collected in the FLAPS survey, the agency concluded that ''it is likely that the number of 'healthy' individual foods included in the 1999 market place analysis [using only IRI data] underestimates the number of individual food products bearing 'healthy' claims'' (68 FR 8163 at 8166). Thus, rather than using the FLAPS data to augment its numerical estimate of products bearing a ''healthy'' claim as the comment assumed, FDA used these data only to support its assertion that the numerical estimate generated from the IRI data by counting the products with ''healthy'' claims in their brand names had likely underestimated the number of products bearing a ''healthy'' nutrient content claim somewhere in their labeling.

The comment's criticism of FDA's estimate also reflects a misunderstanding of which products identified in the FLAPS survey were counted as bearing a ''healthy'' claim. The examples of illegitimate ''healthy'' claims cited in the comment appear to have come from attachment B of reference 4 of the 2003 proposed rule. Reference 4 of the 2003 proposed rule (Ref. 9) is a 2001 cover memorandum entitled ''1997 Food Labeling and Package Survey (FLAPS) Product Label Evaluation for 'Healthy' Claims''. Attachment B is a list of all label statements identified in the 1997 FLAPS survey that included the word ''healthy'' or a variant (e.g., ''health'' or ''healthful''). Contrary to the comment's assumption, however, this list is not the list of FLAPS products that FDA counted as bearing a ''healthy'' claim. Compiling this list was only a preliminary step in FDA's marketplace data analysis. When the proposal was being developed, each statement in this list was carefully examined to determine whether or not it was in fact a ''healthy'' claim.

The agency agrees with the comment that label statements about the health effects of phenylketonurics and saccharin are not ''healthy'' claims and that products with such statements should not be counted as products with a ''healthy'' claim. It also agrees that statements in labeling such as ''eat healthy, eat well'' should not be counted as ''healthy'' claims because they do not imply that the food has levels of nutrients that meet the ''healthy'' definition. Rather, such statements provide dietary guidance to consumers or make general statements about health and diet. A careful reading of the 2001 cover memorandum (Ref. 9) demonstrates that FDA recognized during the development of the 2003 proposed rule that the statements listed in Attachment B were not all ''healthy'' claims:

> Some of the statements are dietary guidance statements (e.g., ''Eat 5 servings of fruits and vegetables every day for better health'') or hazard warnings (e.g., ''Phenylketonurics: Contains phenylalanine. Use of this product may be hazardous to your health.''), neither of which are implied nutrient content claims for ''healthy.''

The comment is correct that the 2003 proposed rule did not use the most recent IRI data on the number of ''healthy'' individual foods in the marketplace; however, the 2003 IRI data submitted with the comment only reinforce FDA's ultimate conclusions about the downward trend in the number of such products. Due to budget constraints, the 1999 IRI data were the most recent available to FDA at the time the 2003 proposed rule was being developed. The 2003 proposed rule specifically asked for additional marketplace data, and the agency received the more recent data provided by the comment that further support the difficulty of making and marketing products which may be labeled as ''healthy.'' As discussed in section III.F.3 of this document, the agency has taken these data into consideration in deciding how to regulate the sodium

[3] The IRI InfoScan database contains dollar sales information for food and dietary supplement products. InfoScan includes information collected weekly from a selected group of grocery, drug, and mass merchandiser stores across the continental United States with annual sales of $2 million and above (sample store data)—more than 32,000 retail establishments. The retail stores are statistically selected and meet IRI's quality standards. The database contains sales data for all products in these retail stores that are scanned (i.e., sold) at checkout. IRI applies projection factors to the sample store data to estimate total sales in the continental United States from stores that have annual sales of $2 million and above. The database does not include data from stores with annual sales of less than $2 million. The database provides information by brand name only and cannot be used to determine the number of products with claims outside the brand name.

content of foods bearing the ''healthy'' claim.

Further, FDA's analysis of the IRI and FLAPS marketplace data was intended to provide only an estimate of the number of ''healthy'' products, not an exact count. It would be extremely difficult, if not impossible, to get an accurate count of the exact number of products that bear and qualify for the ''healthy'' claim. Obtaining an accurate count would involve examining all panels of the labels of all FDA-regulated food products, including those that use ''healthy'' as part of their brand name, to determine whether the label bore the term ''healthy'' as a nutrient content claim. Once products bearing the ''healthy'' claim were identified, the person responsible for the count would have to check the nutrition facts panel to determine if the product met the requirements for this claim. Even then, without a laboratory analysis of the product, it would be impossible to determine conclusively whether the product actually complied with the definition of ''healthy.'' Thus, getting an exact count of products legitimately labeled with the ''healthy'' claim would be an extremely burdensome and resource-intensive task. In light of the need to move forward with the 2003 proposed rule and other regulatory priorities, the agency was justified in using its available resources to make an estimate, rather than an exact count, of the number of products bearing the claim ''healthy.''

*F. Sodium Level Requirement for ''Healthy'' Claims*

1. Need for Sodium Level

(Comment 7) One comment argued that sodium content should not be a criterion for whether a food can be labeled as ''healthy'' because, according to the comment, current nutritional science does not show beneficial health outcomes from reducing sodium in the diet. The comment recommended that FDA revise the ''healthy'' regulation to remove the sodium level requirements entirely.

(Response) FDA disagrees with the comment that advocated dropping all sodium criteria for the ''healthy'' claim. As discussed previously in response to comment 1 of this document, there is ample evidence that sodium has an adverse impact on cardiovascular disease, particularly hypertension, and that as a consequence, the amount of sodium in an individual food or meal type product should be controlled in order for such a product to be labeled as ''healthy''.

2. Sodium Level for Meal and Main Dish Products

(Comment 8) Most comments supported or did not object to maintaining the current first-tier sodium level of 600 mg for meals (as defined in § 101.13(l)) and main dishes (as defined in § 101.13(m)). Comments emphasized the importance of making sure that ''healthy'' meals and main dishes, which present a more healthful alternative to standard processed foods, can continue to be marketed without sacrificing taste and commercial viability. These comments took the view that it is better to avoid driving nutritious, controlled-sodium alternatives to standard processed foods out of the marketplace than to bring about the small incremental reduction in sodium that would result from allowing the second-tier level for meals and main dishes from going into effect. One comment suggested that the current regulations have already had a chilling effect on the term ''healthy'' on meal and main dish products. According to this comment, the number of brands of frozen entrees or dinners bearing the ''healthy'' claim decreased from seven to one between 1994 and 2003. The comment suggested that maintaining the first-tier sodium levels for meals and main dishes would help achieve the goals FDA articulated in the ANPRM and 2003 proposed rule: To develop sodium criteria for the definition of ''healthy'' that allow a significant number and variety of products to be labeled as ''healthy,'' yet that are not so broadly defined as to cause the term to lose its value in identifying products that are useful for constructing a healthy diet consistent with dietary guidelines. See 62 FR 8163 at 8165; 62 FR 67771 at 67772.

Of the few comments that opposed FDA's proposal to retain the first-tier sodium level requirement for meals and main dishes, one consumer comment suggested that the rules for sodium content of meals and main dishes should be stricter than the first-tier level currently in effect but did not specify whether FDA should implement the second-tier level or an even lower level. Another comment took issue with the agency's rationale for proposing to retain the current first-tier sodium level of 600 mg for meals and main dishes. This comment argued that the agency's concern about driving ''healthy'' meals and main dishes from the market by implementing the lower second-tier sodium level requirement of 480 mg is not a legitimate reason for retaining the more lenient 600 mg sodium requirement and thus allowing unhealthy products to be labeled as ''healthy''. The comment argued that because the intent of the regulation was to promote health, FDA should not retain the current 600 mg sodium level because it would not guide individuals to build a diet that meets Federal nutrition recommendations. This comment reasoned that the 2000 Dietary Guidelines (Ref. 1) recommend that sodium intake not exceed 2,400 mg per day[4] and that the Food Guide Pyramid recommends a minimum of 15 servings of food per day to meet nutrient needs. The comment stated that, on average, sodium intake should not exceed 160 mg per serving of food. Given that a meal contains 2–3 servings of food, the comment reasoned that a meal should contain no more than 480 mg sodium. As discussed in comment 7 of this document, one comment suggested that the sodium requirement for meals should be dropped altogether.

(Response) The agency acknowledges the comments' concerns about the amount of sodium in meal and main dish products and agrees that FDA should encourage manufacturers to limit the amount of sodium in these products. However, the comments presented no data to substantiate the technical and commercial feasibility of implementing the second-tier sodium criterion for meals and main dishes at the 480 mg per labeled serving level. Consequently, the agency has no basis to change its position on this issue. In the 2003 proposed rule, the agency described the reasons why FDA had tentatively concluded that the first-tier sodium level for ''healthy'' meals and main dishes should be retained:

> Based on the marketplace data analysis, the agency found that there were a limited number of ''healthy'' meal and main dish products that met the current first-tier sodium level. The agency further found a general decline in the number of meal and main dish products available in 1999 compared to 1993. * * *
>
> This appears to indicate that providing consumers with a palatable ''healthy'' product at the current, first-tier sodium level is difficult.
>
> The limited number of ''healthy'' meal and main dish products affects FDA's goal to provide a definition for ''healthy'' that permits consumers access to a reasonable number of products that bear the ''healthy'' claim. If FDA were to allow the second-tier sodium level for ''healthy'' meal and main dish products to take effect, there would likely be an even greater reduction in the number of available ''healthy'' meal and main dish products in the marketplace.

[4] The current recommendation for sodium for adults in the ''Dietary Guidelines for Americans 2005'' is 2,300 g per day (Ref. 3). This is also the UL for sodium found in The Electrolyte Report (Ref. 2).

Furthermore, some manufacturers of ''healthy'' meal and main dish products might choose to limit only fat or calorie levels and change to ''lean,'' ''low calorie,'' or ''low fat'' claims. Although those claims do provide some assistance to consumers who are trying to construct a diet consistent with dietary guidelines, there are additional nutritional benefits in products bearing a ''healthy'' claim. * * *

Moreover, FDA finds the petitioner's comment that a number of meal and main dish products would ''disappear'' to be persuasive because the petitioner is one of only a few manufacturers currently producing ''healthy'' meal and main dish products. The marketplace data analysis * * * showed that there were a limited number of ''healthy'' meal and main dish manufacturers, with one manufacturer producing most of the ''healthy'' meal and main dish products. * * * Five brands that were available for sale in 1993 had completely disappeared from the market by 1999. * * * Considering the petitioner's expertise in the ''healthy'' frozen meal and main dish market, and the trends seen in the marketplace, FDA believes that the petitioner raised valid concerns about the second-tier sodium level for meal and main dish products * * * .

Furthermore, the first-tier sodium level proposed for ''healthy'' meal and main dish products is proportionate to and adequately reflects their contribution to the total daily diet while remaining consistent with current dietary guidelines. If each meal or main dish product has a maximum of 600 mg sodium and if one meal or main dish product is consumed at each of three meals during a typical day, then this accounts for a total of 1,800 mg sodium from meal and main dish products. This is consistent with previous agency assumptions that daily food consumption patterns include three meals and a snack with about 25 percent of the daily intake contributed by each (final rule on nutrient content claims (58 FR 2302 at 2380, January 6, 1993)). The 1,800 mg sodium level is well below the suggested 2,400 mg recommendation[5] and allows for flexibility in the rest of the daily diet (i.e., the snack). * * *

FDA tentatively concludes that the first-tier sodium level for meal and main dish products allows a ''healthy'' definition that is neither too strictly nor too broadly defined. The first-tier sodium level will allow consumers to meet current dietary guidelines for sodium intake while still maintaining flexibility in the diet. Additionally, the agency believes that by retaining the first-tier sodium level, a reasonable number of ''healthy'' meal and main dish products will remain available to consumers. Therefore, the agency has tentatively concluded that the current first-tier level of 600 mg sodium per serving size should be retained as the sodium criterion for ''healthy'' meal and main dish products. * * *

(68 FR 8163 at 8169–8170 (reference omitted).)

[5] The recommendation in the current edition of the Dietary Guidelines is 2,300 mg/day. See footnote 4 in this document.

Having received no data that would justify changing the tentative conclusions outlined in the 2003 proposed rule, FDA has decided to eliminate the second-tier (480 mg) requirement for ''healthy'' meals and main dish products that was adopted in the 1994 final rule and that would have gone into effect when the partial stay of that rule expired.

In addition, although there may be difficulties in formulating products that control sodium in addition to other nutrients, the marketing of a variety of these nutrient controlled products shows that it is possible to limit the sodium level in meal-type products to the first-tier level, 600 mg. Consequently, the agency does not see the merit or necessity of eliminating the sodium criterion altogether.

Therefore, as proposed, FDA is amending the requirements for use of the term ''healthy'' on meal and main dish products to do the following: (1) To make permanent the current first-tier sodium level requirement of 600 mg per labeled serving, and (2) to delete the more restrictive second-tier sodium level requirement of 480 mg per labeled serving that was adopted in the 1994 final rule and would have become effective when the partial stay of that rule expired.

3. Sodium Level for Individual Foods

(Comment 9) A few comments supported implementing the more restrictive second-tier sodium level of 360 mg per RACC and per labeled serving for individual foods. One comment asserted that promoting good health should be a higher priority than manufacturers' difficulties with formulating and marketing lower sodium products. This comment argued that the fact that truly ''healthy'' products may not be available does not justify stamping ''healthy'' on unhealthy products. Another comment hypothesized that the number of products qualifying as ''healthy'' is not extensive because food processors have resisted efforts to reduce the sodium content. This comment expressed disagreement with the petitioner's contention that the second-tier sodium level cannot be met, and asserted that the available data do not justify such a conclusion.

(Response) The agency agrees with the comments that foods labeled as ''healthy'' should in fact promote good health. When FDA issued the 1994 final rule providing for a phased-in second-tier sodium level of 360 mg per RACC and per labeled serving, the agency had anticipated that with the passage of time, there would be sufficient technological progress to make it feasible to implement this lower sodium level requirement for foods labeled as ''healthy.'' However, in both the 1997 ANPRM and the 2003 proposed rule, the agency recognized that technological and safety concerns might justify reconsidering the second-tier sodium level. For example, in the ANPRM FDA said (62 FR 67771 at 67773):

If the petitioner is correct that the technology does not yet exist that will permit manufacturers, by January 1, 1998, to produce certain types of low fat foods at the lower levels of sodium required in § 101.65(d) that are still acceptable to, and safe for, consumers, then the possibility exists that ''healthy'' will disappear from the market for such foods. This result would force consumers who are interested in foods with restricted fat and sodium levels to choose among foods in which an effort has been made to lower the level of one or the other of these nutrients but not necessarily both. * * * Therefore, the agency has decided that, before allowing the new sodium levels for ''healthy'' to go into effect, it needs to explore whether it has created an unattainable standard * * * .

The 2003 proposal summarized the technological and safety considerations presented in the 1997 ANPRM, including consumer acceptance of foods at the second-tier sodium levels, availability of sodium substitutes, difficulties in manufacturing foods with reduced sodium levels, and the impact of lower sodium levels on the shelf-life, stability, and safety of the food (68 FR 8163 at 8164). In addition, the proposed rule reiterated FDA's goal of ensuring continued availability of ''healthy'' foods for consumers to purchase (68 FR 8163 at 8165):

The fundamental purpose of a ''healthy'' claim is to highlight those foods that, based on their nutrient levels, are particularly useful in constructing a diet that conforms to current dietary guidelines * * * . To assist consumers in constructing such a diet, a reasonable number of ''healthy'' foods should be available in the marketplace.

[FDA's] goal was to establish sodium levels for the definition of ''healthy'' that are not so restrictive as to preclude the use of the term ''healthy'' * * * .

In keeping with this goal, FDA solicited comments on the potential impact of the second-tier sodium level on specific categories of individual foods (68 FR 8163 at 8167). As discussed in comment 11 of this document, the majority of comments opposed the agency's proposal to allow the second-tier sodium level to go into effect. Some of these comments included data supporting their position. In contrast, the proponents of the second-tier sodium requirement did not provide supporting data as to why this lower level is appropriate and how it could be technologically accomplished.

(Comment 10) One comment that did not agree with implementing the second-tier sodium levels suggested an alternative. This comment suggested that FDA set sodium level requirements for ''healthy'' individual foods on a case by case basis instead of applying the second-tier sodium level to all types of individual foods. For example, the comment suggested that the sodium requirement for soups be lowered from the first-tier requirement by 30–50 mg per serving rather than 120 mg as required by the second-tier sodium level, to retain the palatability of ''healthy'' soups. To create broad incentives for companies to lower the sodium content of processed foods, this comment recommended that FDA take a similar approach for other categories of foods and set appropriate sodium levels (higher than the second-tier level, but lower than the first-tier level) on a category-by-category basis. According to the comment, modest reductions in sodium across a wide range of individual processed foods in the total diet could have a significant effect.

(Response) Although the alternative suggested in this comment has some appeal as a compromise between the first- and second-tier levels, the comment did not include supporting data, unlike comments advocating that FDA retain the first-tier level for individual foods. With regard to the comment's specific recommendation to lower the sodium level requirement for ''healthy'' soups by 30–50 mg per reference amount and per labeled serving below the first-tier level (rather than the 120 mg reduction required by the second-tier level), the comment provided no data on the benefits of reducing the sodium requirement by 6–10 percent as opposed to the 25 percent reduction that would result from the second-tier sodium requirement, on whether a 6–10 percent reduction would be feasible, or on the effect that such a reduction would have on the overall amount of sodium in soups that currently use ''healthy'' claims or that have used ''healthy'' claims in the past. In contrast to the absence of data supporting this alternative regulatory approach, FDA has enough data about the feasibility of formulating and selling ''healthy'' foods at the current first-tier sodium level to be confident that retaining this level will promote the continued availability of nutritious processed foods that will assist consumers in following dietary guidelines.

Moreover, this comment advocates a regulatory approach based on product categories (i.e., different sodium level requirements for different product categories like soups and cheeses); such an approach would not be consistent with the principles of consistency and uniformity that have always guided FDA's regulation of nutrient content claims. Although FDA does vary the criteria for nutrient content claims somewhat for broad classes of products (such as meals and main dishes, seafood and game meat, and foods with small servings) to accommodate inherent differences in the nutrient characteristics of different classes of foods, the agency has never created food-specific exemptions or nutrient criteria to accommodate the making of a nutrient content claim for an individual food category, such as soups, that otherwise could not qualify for the claim.

When the nutrient content claims requirements were being developed, the agency rejected the notion of having variable nutrient requirements for various commodities. In the proposed rule on general requirements for nutrient content claims in food labeling, FDA explained its view as follows:

> The use of different criteria for different food categories has several disadvantages that affect both consumers and the food industry. When different criteria are used for different categories of foods, consumers cannot use the descriptors to compare products across categories and will likely find it difficult to use the descriptors for substituting one food for another in their diets.
>
> * * * [T]he agency believes that such a system would have a high potential for misleading the consumers about the nutrient content of foods * * * . [W]ith different criteria for different food categories, it would be possible that some foods that did not qualify to use the descriptor would have a lower content of the nutrient than foods in other categories that did qualify. * * *
>
> FDA has received many comments asking for increased consistency among nutrient content claims to aid consumers in recalling and using the defined terms. In addition, the IOM report recommended that ''low sodium,'' for example, should have the same meaning whether it is applied to soup, frozen peas, or meat. Accordingly, the agency concludes that establishing different cutoff levels for each nutrient content claim for different food categories would greatly increase the complexity of using such claims to plan diets that meet dietary recommendations. * * *

(56 FR 60421 at 60439, November 27, 1991 (reference omitted).)

Further, as stated in the comments on consumer understanding summarized in section II.C of this document, there may already be some confusion as to what the term ''healthy'' means. This confusion could worsen if the definition for ''healthy'' meant different sodium levels for different foods. Consequently, the agency is not establishing a different sodium criterion for ''healthy'' for soups or other individual product categories.

(Comment 11) A majority of the comments supported retaining the less restrictive, first-tier sodium level for individual foods. Comments argued that if the lower second-tier sodium level for ''healthy'' individual foods takes effect, many foods that meet the current criteria for ''healthy'' would disappear from the marketplace because the second-tier standard is difficult or impossible to meet while maintaining palatability. They expressed the view that although the first-tier level for sodium is not perfect, it is preferable to seeing products labeled as ''healthy'' disappear from the marketplace.

Several comments stated that consumers will not accept or purchase foods that meet the second-tier level for sodium, explaining that consumers want good taste and that these lower sodium products do not taste as good as products with more sodium. Some of these comments pointed out that lowering the sodium content of a food can affect its texture, which in turn may also affect whether consumers are willing to purchase the food. One comment from a food manufacturer stated that even under the current, less restrictive first-tier sodium criterion, production and consumer acceptance are difficult. This comment cited data showing that consumers buy relatively few ''healthy'' products; for example, ''Healthy Choice'' makes up less than 1/10th of 1 percent of all food products (Ref. 10). This comment also asserted that eating trends had changed between 1994 and 2003. The comment stated that according to National Eating Trends 2003 data, consumption of foods free of or low in salt or sodium was currently 1.5 percent, down from 3.3 percent in 1994.[6]

According to the comment, a 1994 *Prevention Magazine* article entitled ''Eating in America: Perception and Reality'' reported data from the Food Marketing Institute showing that of 597 shoppers surveyed, 89 percent said that taste was the most important factor in food selection.[7] The comment also asserted that taste tests conducted in 2003 by the manufacturer who

[6] The comment did not include a copy of this reference, and FDA was unable to locate it.

[7] FDA determined that this information, though accurate, did not come from the *Prevention* article cited in the comment but rather from a report summarizing data collected for the Food Marketing Institute by Abt Associates. The report ''Trends in the United States—Consumer Attitudes and the Supermarket, 1996'' states that in each year from 1991 to 1996, taste ranked highest in importance (89–91 percent) of various factors (e.g., nutrition, product safety, and price) in food selection (Ref. 11).

submitted the comment found that modern ''salt enhancers'' and bitter blockers (substances that block bitter tastes in foods) were not sufficient to make soup containing only 360 mg sodium appealing to consumers, while the manufacturer's current soup version at 480 mg sodium was found to be acceptable to consumers (Ref. 12).

The comment also cited IRI data on soup sales (Ref. 13). These data showed that the soup category currently has $ 2.7 billion in sales, of which only $ 19 million is for soup with 360 mg or less sodium. The comment calculated that soups with 360 mg or less sodium account for only 1.7 percent of ''Ready to Serve'' soup sales. ''Low sodium'' soups (less than 140 mg) make up less than 0.4 percent of the ready to serve market, and sales of these soups are falling. Further, there are no low sodium condensed soups on the market.

In addition, this comment included a graph of the market sales of a leading manufacturer of soups labeled as ''healthy.'' This graph shows a drop in sales of roughly 75 percent from 1999 to 2003, when the sodium level in the soups was reportedly reduced from 480 mg to 360 mg. The comment cited a case of another major manufacturer marketing ''healthy'' soups that reportedly increased the sodium in its products by 1/3 to 1/2; this increase in sodium content was followed by an increase in product sales.

The comment further stated that there are very few manufacturers left that produce foods that qualify to bear the term ''healthy.'' The comment asserted that in eight of the nine food categories in which the manufacturer that submitted the comment competes, its product is the only product with the term ''healthy'' in its brand name.

Other comments also focused on the limited selection and dwindling numbers of ''healthy'' products. One comment stated that in the past 5 years there has not been a significant number of new ''healthy'' product offerings (only 80 such new products, or about 16 per year). The comment added that of these new products, 76 percent of them were under the same brand name, ''Healthy Choice.'' In contrast, there are approximately 20,000 ''non-healthy'' new product offerings each year. The comment said that certain product categories such as ''healthy'' cheese had already disappeared and expressed concern that if the lower second-tier sodium level for a ''healthy'' claim was implemented, even more products would disappear from the market. Another comment took a different view, suggesting that the absence from the market of ''healthy'' cheese could have a positive impact by encouraging consumers to switch to more healthful whole foods such as fruits, vegetables, grains, and legumes.

One comment added that consumer acceptance of food products with sodium content low enough to meet the second-tier sodium requirement has not been encouraging and that lowering the sodium level will decrease flavor and reinforce the concept that healthy foods taste bad. Another comment contended that implementing the lower sodium level requirement for ''healthy'' would be counterproductive to the goal of encouraging the creation of more foods that qualify for the ''healthy'' claim. This comment argued that if consumers will not eat current ''healthy'' foods, they are less likely to eat new ones with even lower sodium. According to the comment, by disqualifying many ''good-for-you'' products from being labeled as ''healthy,'' FDA risks less development and commercialization of similarly healthful products.

A number of comments stated that lowering the sodium level by 120 mg for already reduced sodium products will not have a positive effect. Several comments asserted that reducing the number of ''healthy'' products further will force products off the shelves, leaving only higher sodium alternatives.

A comment from a consumer group concurred, suggesting that the ''Healthy Choice'' brand has an incentive effect on the market. If the ''Healthy Choice'' products disappear from the market because of the second-tier sodium requirement, there will be no more incentive. Consumers will be left with higher sodium alternatives, will not be likely to search for the next best alternative, and will return to full sodium soups at 800–1000 mg of sodium per serving. An industry comment stated that the first-tier level requirement had brought down the average sodium level for all soups by 32 mg per serving from 882 to 850. This comment predicted that if the level required to bear the term ''healthy'' is dropped further, the average sodium level will go back up.

As evidence that the second-tier sodium level is too restrictive, another comment pointed out that some products that qualify for a coronary heart disease health claim or American Heart Association's (AHA's) heart check program, such as ready to eat cereals with fiber, would not be able to qualify for the term ''healthy'' under the more restrictive second-tier sodium requirement.

In summary, many comments stated that the potential benefit of having ''healthy'' products with a slightly lower sodium level was not worth the risk of losing currently marketed ''healthy'' products. These comments emphasized that while the current option is not perfect, ''healthy'' products are better than their standard alternatives even at the higher first-tier sodium level. They believe that lowering the sodium limit could reverse progress made since the term ''healthy'' was defined in 1994.

(Response) The agency has taken into account these comments and the supporting data provided. FDA believes it is essential that low fat, nutritious products that are also reduced in sodium be available for consumers who wish to control both fat and sodium. The agency finds persuasive the information on technological barriers to reducing sodium in processed foods and the data demonstrating the difficulty in achieving palatable products that meet the second-tier sodium requirement. Without consumer acceptance of ''healthy'' foods, public health goals of reducing dietary sodium and fat (as well as saturated fat and cholesterol) will not be met, and the ''healthy'' claim will not foster better dietary practices in the long run. FDA has also taken into account the data on decreased market shares of existing ''healthy'' products and the dearth of new ''healthy'' products as companies have begun preparing to comply with the second-tier sodium requirements. These data make a persuasive case that, rather than encouraging the development of new products, allowing the second-tier sodium requirement for individual foods to go into effect would have the opposite effect on the market.

Therefore, the agency has decided to eliminate the second-tier sodium level requirement for ''healthy'' individual foods that was adopted in the 1994 final rule and would have gone into effect when the partial stay of that rule expired. For consistency across all categories of individual foods (see response to comment 10 of this document), the agency has also decided to eliminate the second-tier sodium level requirement for ''healthy'' raw, single ingredient seafood and game meat.

Therefore, FDA is amending the requirements for use of the term ''healthy'' on individual foods and raw, single ingredient seafood and game meat (1) to make permanent the current first-tier sodium level requirement of 480 mg per reference amount customarily consumed and per labeled serving or, if the serving size is small (30 g or less or 2 tablespoons or less), per 50 g; and (2) to delete the more restrictive second-tier sodium level requirement of 360 mg that was adopted in the 1994 final rule and

that would have become effective when the partial stay of that rule expired.

*G. Legal Issues*

(Comment 12) A few comments raised legal objections to FDA's proposal to implement the second-tier sodium level requirement for individual foods labeled as ''healthy.'' Specifically, comments alleged that allowing the second-tier sodium level to go into effect would facilitate the use of a false and misleading statement in food labeling in violation of the act, would be arbitrary and capricious in violation of the Administrative Procedure Act, would violate manufacturers' commercial speech rights under the First Amendment to the United States Constitution, and would effect an unconstitutional regulatory taking under the Fifth Amendment.

(Response) Because FDA is not adopting the proposal to allow the second-tier sodium level requirement for ''healthy'' individual foods to go into effect, but instead is removing that requirement from the ''healthy'' regulation, these comments are moot and need not be addressed.

*H. Clarification in Regulatory Text*

In the 2003 proposed rule (68 FR 8163 at 8171), FDA proposed to amend the ''healthy'' definition in § 101.65(d)(1) to specify that a claim that suggests that a food, because of its nutrient content, may be useful in maintaining healthy dietary practices, is an implied nutrient content claim if it is made in connection with either an explicit or implied claim or statement about a nutrient. The purpose of this proposed change was to clarify the scope of ''healthy'' claims covered under § 101.65(d) and to make the regulatory text consistent with preamble discussions in the 1993 proposed rule (58 FR 2944 at 2945, January 6, 1993) and 1994 final rule (59 FR 24232 at 24235), where FDA made clear that claims made in connection with an implied claim or statement about a nutrient would be covered by the ''healthy'' regulation.

FDA received no comments on this provision of the proposed rule and is adopting it as proposed.

*I. Plain Language*

In the 2003 proposed rule, FDA proposed changes to the format and regulatory text of the ''healthy'' regulation to be consistent with the Presidential Memorandum on Plain Language (Ref. 14) and to make the regulation easier to understand and follow. The proposed changes consisted of converting the nutrient requirements in § 101.65(d) for foods labeled as ''healthy'' from a text-based format to a table-based format. The agency also proposed several minor changes in the wording of § 101.65(d) to make the regulation more concise and easier to understand.

(Comment 13) There was only one comment concerning plain language. This comment took issue with the length and complexity of the preamble, but not the content of the codified.

(Response) As there were no suggestions as to how the codified might be revised to more closely comply with the Presidential Memorandum instructing Federal agencies to use plain language, the agency is making no changes in response to this comment.

FDA is adopting the proposed table-based format for the ''healthy'' nutrient criteria. In addition, proposed § 101.65(d)(2)(iv) and (d)(2)(v) have been incorporated into the first table in this final rule.

For the most part, the agency is also adopting the proposed changes to the regulatory text itself. However, on further consideration, the agency has decided to return to the original language of § 101.65(d) in a few instances to avoid creating inconsistencies with the language of existing nutrient content claims regulations. For example, the agency has decided not to change the term ''labeled serving'' to ''serving size'' (SS) to clarify that there is no difference in meaning from other nutrient content claim regulations that specify nutrient criteria for the claim using ''labeled serving'' (e.g., § 101.62(b), defining nutrient criteria for ''fat free''). LS refers to the serving size that is determined according to the rules in § 101.9(b) and specified in the Nutrition Facts or Supplement Facts panel on the product label.

As FDA explained in the 2003 proposed rule (68 FR 8163 at 8171), the new format and other plain language changes are not intended to affect the meaning of the ''healthy'' regulation.

*J. Effective Date*

Under the Administrative Procedure Act (5 U.S.C. 553(d)), and FDA's regulations (§ 10.40(c)(4) (21 CFR 10.40(c)(4)), publication of a rule must normally take place 30 days before the rule's effective date. However, exceptions to this requirement are permissible in the case of ''a substantive rule which grants or recognizes an exemption or relieves a restriction'' (5 U.S.C. 553(d)(1); see also § 10.40(c)(4)(i).

This rule is a substantive rule that relieves a restriction. If FDA did not issue this rule, the second-tier sodium level requirements for the ''healthy'' claim would go into effect on January 1, 2006, when the stay of these requirements expires (see 67 FR 30795). The second-tier sodium level requirements are more restrictive than the first-tier sodium level requirements and would allow fewer products to bear the ''healthy'' claim. By revoking the more stringent second-tier sodium level requirements for the ''healthy'' claim and making permanent the less stringent first-tier sodium level requirements for this claim, this rule relieves a restriction.

## IV. Analysis of Environmental Impact

The agency has carefully considered the potential environmental effects of this action. FDA has concluded under 21 CFR 25.30(k) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

## V. Analysis of Impacts

*A. Regulatory Impact Analysis*

FDA has examined the impacts of this final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including: Having an annual effect on the economy of $100 million or adversely affecting in a material way a sector of the economy, competition, or jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues. The Office of Management and Budget has determined that this rule is a significant regulatory action under Executive Order 12866, although it is not economically significant.

1. The Need for Regulation

To bear the term ''healthy,'' products must not exceed established levels for fat, saturated fat, cholesterol, and sodium. The existing regulation states that meals and main dishes, as defined in § 101.13(l) and (m) respectively, must have sodium levels no higher than 600 mg per labeled serving (either a large

portion of a meal or the entire meal) in the first-tier compliance period, and sodium levels no higher than 480 mg per labeled serving in the second-tier compliance period, which was originally scheduled to begin on January 1, 1998. The regulation also states that ''healthy'' foods other than meals and main dishes must have sodium levels no higher than 480 mg per reference amount and per labeled serving or, if the serving size is small (30 g or less or 2 tablespoons or less), per 50 g, in the first-tier compliance period, and sodium levels no higher than the second-tier 360 mg per reference amount and per labeled serving thereafter. The agency initially stayed the second-tier sodium levels until January 1, 2000 (62 FR 15390, April 1, 1997). FDA has since extended the stay twice: First until January 1, 2003 (64 FR 12886, March 16, 1999), and more recently until January 1, 2006 (67 FR 30795, May 8, 2002).

This rule modifies the definition of the term ''healthy'' by making permanent the first-tier sodium levels of 600 mg per labeled serving for meals and main dishes and 480 mg per reference amount and per labeled serving (or per 50 g if the serving size is small) for individual foods. Making the first-tier levels permanent will help preserve the ''healthy'' claim as a signal that products bearing that claim in their labeling are nutritious and will help contribute to a healthy diet. Without this modification, the second-tier sodium levels would take effect; as a result, many producers would likely cease using the ''healthy'' claim (or perhaps cease marketing the product), leading to a reduction in the eating options and health-related information available to consumers.

2. Regulatory Options

FDA identified several options in the 2003 proposed rule (68 FR 8163 at 8171 to 8172): (1) Make no change to the current rule, which would allow the second-tier sodium levels to go into effect; (2) amend the definition of ''healthy'' to eliminate the second-tier sodium levels for some or all products; (3) continue the stay to give producers time to develop technological alternatives to sodium; or (4) consider different second-tier sodium limits. Analyzing probable technological change (option 3) is beyond the scope of this analysis; innovation is difficult to predict. Also, analyzing alternative second-tier sodium limits in terms of net benefits (option 4) is not feasible in this analysis because FDA has no way of differentiating health effects or manufacturing costs due to marginal differences in the allowable sodium content of ''healthy'' food products.

The optimum sodium level for individual foods, meals, and main dishes balances the health benefits of limiting sodium intake with the cost to the food industry of making product preparation more complicated and the cost to consumers of limiting product choice. In the analysis that follows, we conclude that the first-tier sodium level strikes that balance better than the second-tier level for all categories of FDA-regulated foods.

The options we consider in this analysis are option 1 (allow second-tier levels to take effect) and 3 versions of option 2 (adopt as permanent the first-tier sodium levels for some or all products):

1. Implement the current rule (i.e., § 101.65(d)) without modification, which would make the second-tier sodium levels effective on January 1, 2006.

2a. Amend the current rule, adopting as permanent the first-tier sodium level for all or specific ''healthy'' individual foods.

2b. Amend the current rule, adopting as permanent the first-tier sodium level for ''healthy'' meals and main dishes.

2c. Amend the current rule, adopting as permanent the first-tier sodium levels for ''healthy'' meals and main dishes and for all or specific ''healthy'' individual foods.

The final rule adopts option 2c.

The baseline in this case is the current rule, or option 1, so the benefits of the other options are the reformulation, rebranding, and relabeling costs avoided by retaining the first-tier sodium content requirements for individual foods or meals and main dishes. The costs of the other options are the negative health effects associated with the potential net increases in sodium intake under options 2a, 2b, and 2c.

Since the baseline is the current rule, or option 1, the market data used to analyze the marginal and total costs and benefits of options 2a, 2b, and 2c are a snapshot of the market before the 2003 proposed rule was published. Predicting an amendment to the current rule, based on the publication of the 2003 proposed rule, some manufacturers of meals and main dishes may have already reacted by reformulating or changing their product lines (e.g., manufacturers who had begun preparing for the effective date of the second-tier sodium level by producing ''healthy'' meals and main dishes with sodium content below the first-tier level may have reformulated these products back to the first-tier level for taste and texture after FDA proposed to make the first-tier level permanent for meals and main dishes). To estimate the net effects of this final rule compared with the scheduled second-tier levels adopted in the 1994 final rule, it is necessary to use data from before the 2003 proposed rule so as not to incorporate changes made in anticipation of this final rule. Therefore, the data used to calculate the baseline are from before the publication of the 2003 proposed rule.

*Option 2a: Retain the First-Tier Sodium Level for All or Specific ''Healthy'' Individual Foods.*

*Costs of Option 2a.* The principal costs of this option are associated with the deterioration of ''healthy'' as a signal of foods with strictly controlled levels of sodium and the consequent potential increase in overall sodium intake. These costs would in large part be mitigated by the countervailing risks avoided by retaining a larger selection of ''healthy'' products. ''Healthy'' products are not only controlled in sodium, but also low in fat and saturated fat, controlled in cholesterol, and have at least 10 percent of the DV of one of the following: Vitamin A, vitamin C, calcium, iron, protein, or fiber. If products were forced off the market by a more restrictive sodium requirement, consumers would have fewer choices not only among products that are controlled in sodium, but also among products that are low in fat and saturated fat, and controlled in cholesterol.

According to information provided in the comments, it appears that most ''healthy'' individual foods other than soups and cheeses could meet the second-tier sodium limit without substantial adverse changes in taste or texture. Retaining the first-tier sodium level for all individual foods would diminish the effectiveness of the ''healthy'' controlled sodium signal compared with option 2b (retaining the first-tier sodium level for meals and main dishes) because there are more individual foods on the market than meals and main dishes. Alternatively, if FDA retained the first-tier ''healthy'' sodium level only for soups and cheeses, this inconsistency would diminish the usefulness of the term ''healthy'' as a signal to identify individual foods with uniformly controlled levels of sodium.

In addition, retaining the first-tier level for individual foods under option 2a would be less consistent with the ''healthy'' definition for meals and main dishes than allowing the second-tier sodium level to go into effect under option 1. The first-tier sodium level for combinations of ''healthy'' individual foods allows more sodium than when those same foods are combined into meals and main dishes. ''Healthy'' meal and main dish products must contain at least three and two non-condiment food groups respectively, and still can only

contain 600 mg sodium per meal or main dish under the first-tier sodium level. By contrast, two ''healthy'' individual foods combined in exactly the same way could contain 720 mg sodium under the stayed second-tier level, and up to 960 mg sodium under option 2a (first-tier level), or 40 percent of the Daily Reference Value (DRV). This difference in sodium levels between a meal and two individual foods could have a health effect if consumers are using ''healthy'' specifically as a signal to identify foods with strictly controlled levels of sodium. However, because consumers, under option 2a, could consume three ''healthy'' meal or main dish products plus a ''healthy'' snack (individual food), or five servings of ''healthy'' individual foods, and still remain within the DRV for sodium, the agency concludes that the ''healthy'' signal, though somewhat less effective due to the discrepancy described previously in this document, would still be useful under option 2a.

Sodium intake from soups could either increase or decrease under this option. If consumers of ''healthy'' soups at the current first-tier sodium level will not eat ''healthy'' soups at the more restrictive second-tier sodium levels, they will either switch to another type of soup or to another food category altogether. If most former consumers of ''healthy'' soup, under a more restrictive sodium requirement, simply switch to other brands of soup, which have an average of 850 mg of sodium per serving, sodium consumption could actually increase under this option despite the more restrictive sodium level requirement for products labeled as ''healthy.'' If most former consumers of ''healthy'' soups choose to substitute a different type of controlled or low sodium food for soup, however, sodium consumption could decrease under this option. Since the agency has no data concerning what products consumers will choose if ''healthy'' soups disappear from the market, the change in sodium intake from soup (or products substituted for it) under this option is indeterminate.

Under option 2a, sodium intake from other individual foods is likely to increase slightly. Since most products other than cheeses and soups would be able to meet the second-tier sodium requirement, sodium levels of some of these products may increase relative to what would happen under option 1, which would require individual foods to stay within the lower second-tier sodium level. For most types of individual foods (ice cream and bread, for instance), neither the first-tier nor the second-tier sodium level requirement for the ''healthy'' claim would be a limiting factor because these product categories do not require much sodium to taste good. Therefore, most ''healthy'' individual food products would be expected to contain similar levels of sodium under either the first-tier or second-tier sodium level requirement. Manufacturers of products for which the second-tier sodium levels would be difficult to meet, such as pasta sauce and microwave popcorn, may use more sodium in their products under option 2a than under option 1. However, as with soups, the net effect on sodium consumption is indeterminate. If the more restrictive second-tier sodium requirement caused fewer ''healthy'' options in these product categories to be available and consumers reacted by substituting towards higher sodium alternatives, sodium consumption could actually be lower under option 2a (first-tier sodium level) than under option 1 (second-tier sodium level). On the other hand, if consumers reacted by substituting toward other low sodium or sodium-controlled products, sodium consumption under option 2a would likely be similar to or higher than under option 1. As with soups, without data allowing a prediction of consumer response, the change in sodium consumption under option 2a relative to baseline, though likely to be small, is indeterminate.

It is also important to recall the other requirements for the ''healthy'' claim. ''Healthy'' products are not only controlled in sodium, but also limit fat, saturated fat, and cholesterol, and are significant sources of at least one important nutrient. If ''healthy'' soups and other ''healthy'' individual foods are forced off the market by a more restrictive sodium requirement, there will be fewer relatively healthy food choices for consumers.

The costs of an increased health risk due to a potential increase in average daily intake of sodium are uncertain, although they are likely to be small. The costs of an increased health risk due to a potential increase in average daily intake of sodium are uncertain, although they are likely to be small for three reasons: (1) The increase in sodium intake, as explained previously in this document, is likely to be small; (2) the increased health risk associated with a small increase in sodium consumption is small; and (3) any increased health risk due to increased sodium intake will be offset somewhat by the continued consumption of products that limit fat, saturated fat, and cholesterol, and that are significant sources of at least one important nutrient.

*Benefits of Option 2a.* The benefits of this option are the reformulation, rebranding, and relabeling costs avoided by manufacturers if they do not have to modify their products to meet the second-tier sodium level for individual foods. The benefits of avoiding these costs under this option are substantial. In the market analysis, FDA identified 870 individual food products among 69 brands that make a ''healthy'' claim (Ref. 8).[8] The FLAPS survey also identified several additional individual foods that make a ''healthy'' claim but are not from a ''healthy'' brand (Ref. 9). According to the comments and subsequent analysis by FDA, only 3 of the over 80 food product categories would have material trouble meeting the second-tier ''healthy'' sodium level: Soups, cheeses, and meats (primarily frankfurters and ham). Of these three food product categories affected by this option, ''healthy'' meats are regulated by USDA and therefore are not part of this analysis, and discussions on cheese and soup categories follow in this section of the document.

Other individual foods in other categories may have costs associated with meeting the second-tier sodium level, but FDA has no specific information concerning costs for those other individual foods.

Cheese. Reformulating cheeses to meet the second-tier sodium level would be difficult. However, as of May 2001, every ''healthy'' cheese product had apparently been taken off the market. FDA identified 32 ''healthy'' cheeses, under one brand, on the market in 1999 according to the marketplace data analysis (Ref. 8). In an informal telephone inquiry, FDA confirmed that by May 2001, there were no longer ''healthy'' cheeses produced under this brand (Ref. 15).

With no products to analyze, FDA cannot assess the potential impact of the second-tier sodium level on cheese. ''Healthy'' cheeses could have been taken off the market for any one of three different reasons, each with different implications for the effects of option 2a. First, characteristics of the products in addition to or unrelated to sodium content (e.g. lower fat requirements) could have led to low product demand and eventual product withdrawal. If so, option 2a would not lead to any societal benefits through influencing the market for cheese. Second, firms may not be

[8] One comment on the 2003 proposed rule criticized this estimate. See comment 10 in section II.E of this document for a detailed summary of the comment and FDA's response.

able to create an acceptable ''healthy'' cheese product even under the first-tier sodium level for individual foods, so there would be no cost or benefit difference between the first and second tiers of sodium content. Third, if ''healthy'' cheeses were taken off the market in anticipation of being unable to comply with the second-tier sodium level, adopting option 2a would probably encourage producers to reintroduce ''healthy'' cheese products.

Sodium content was probably not the primary factor in the decision to take ''healthy'' cheeses off the market. Many light mozzarella cheeses, for example, currently have sodium content lower than the second-tier sodium level—between 167 and 357 mg sodium per 50 g cheese in our examples from Washington, DC, area grocery stores (Ref. 15). The ''healthy'' version of this cheese was among the most popular sellers among all ''healthy'' cheeses but was still pulled from the market (Ref. 8).

*Soups.* Costs associated with the current rule, and therefore benefits of avoiding these costs under option 2a, would be substantial for soups. According to a comment on the 2003 proposed rule, ''healthy'' soups had about a 7 percent share of market sales in 2003, and a major producer of ''healthy'' soups stated that its products would likely be discontinued under the second-tier levels. The producer provided evidence in the form of taste tests and survey results for soups containing 360 mg of sodium per serving. The taste tests and survey results indicated that the products would be unsuccessful. Further, ''healthy'' soups with sodium levels near or at 480 mg/serving held around 8 times the market share of ''healthy'' soups with sodium levels near 360 mg per serving. This evidence shows that major producers of ''healthy'' soups would probably either cease producing some or all of their ''healthy'' soups or remove the ''healthy'' claim from product labels rather than reformulate down to 360 mg sodium per serving.

Producers would have to spend resources to reformulate their products to meet the second-tier sodium level. Lost market share due to product reformulation would not be a net loss, but rather a transfer from one company to another. Reformulation costs themselves are the lower limit of the cost to society of allowing the second-tier levels to take effect. If producers could reformulate perfectly, without altering any characteristic of the product other than sodium content, then reformulation would be the total cost of the second-tier levels. But if they could not replicate the desirable characteristics of their product, consumers would also suffer the utility loss of a market with fewer product choices for those who want to buy processed foods that contribute to better nutrition and health in several ways, not solely with respect to sodium content.

FDA lacks data needed to predict how ''healthy'' soup producers would respond to the implementation of the second-tier level of sodium for individual foods. However, a comment to the proposal provided data showing that in 2003, two brands making up more than 90 percent of the ''healthy'' soup market had significantly more than the second-tier levels of sodium in their products. Each of these soups had sodium content at or near the first-tier level of 480 mg/serving. One of these producers stated that it could achieve taste parity for soups reformulated to meet the second-tier sodium level; the other said that it would be forced to discontinue its line of ''healthy'' soups if the second-tier sodium level went into effect. Both of these producers had a similar market share in their respective markets (one in ready-to-eat soup and the other in condensed soup). Therefore, FDA assumes that 50 percent of the 30 products produced by these brands would be reformulated to meet the second-tier level. The other 50 percent of the ''healthy'' soups in these brands would be marketed without the ''healthy'' claim (and possibly also reformulated to increase the sodium content of the soups) or would be discontinued completely. Because the assumption of 50 percent reformulation is uncertain, we also show the costs for 25 percent reformulation and 75 percent reformulation in table 1 of this document.

TABLE 1.—BENEFITS OF AVOIDED COSTS DUE TO OPTION 2A (IN MILLIONS)

| Level of Reformulation | 50% | 25% | 75% |
|---|---|---|---|
| Initial Annual Costs Avoided (First 2 Years) | $20.77 | $27.97 | $13.80 |
| Long Run Annual Costs Avoided | $17.47 | $26.21 | $8.74 |

We do not have detailed reformulation cost estimates for each food category. The following reformulation cost estimations are based on a detailed example of tortilla chip reformulation (see 64 FR 62745 at 62781 to 62782, November 17, 1999), but the steps are typical of food reformulation in general.

Reformulation typically starts in a laboratory, where researchers develop a new, lower sodium formula for their product. Then the company investigates availability and price of new ingredients (herbs, for example) and new equipment. If the reformulated food passes these obstacles, it moves to the test kitchen, where researchers produce the product in small batches. If approved at this level, the product graduates to a pilot plant. Cooking the product in large runs at the pilot plant may prove unsuccessful and require a manufacturer to restart the reformulation process, incurring additional expense. However, if pilot plant tests go well, full scale plant trials commence.

For reformulation of an individual food, FDA assumes 5,000 hours of professional time at $30 per hour, $190,000 for development and pilot plant operating expenses, and $100,000 for market testing per product, based on this industry example. Since this reformulation would be undertaken to keep the ''healthy'' claim on an existing product, we assume negligible relabeling or marketing costs. The total reformulation costs are therefore $440,000 per product, or $6.60 million for the 15 products assumed to be reformulated if ''healthy'' soup producers reformulate 50 percent of their products (reformulation costs are $3.52 million for 8 products under 25 percent reformulation and $10.12 million for 23 products under 75 percent reformulation). This cost would be incurred in the first year or two after the effective date of the rule. Assuming 50 percent of the cost is incurred per year for 2 years, and ignoring the time discount, the cost is $3.3 million per year.

Regardless of the relative costs of reformulation, FDA assumes that a substantial number of market participants will choose to rebrand or relabel their products out of the ''healthy'' category if it becomes too restrictive. This shift has already happened in some product categories

under the current first-tier level: The number of ''healthy'' meals and main dish products dropped from 210 to 148 from 1993 through 1999, and the number of ''healthy'' brands dropped from 13 to 10. This time period spans the adoption of the current definition of ''healthy'' in 1994.

If producers remove ''healthy'' from product labels as a result of the second-tier sodium levels, the direct costs of relabeling the product and conducting a marketing campaign are social costs, since they represent extra investment that does not increase or improve the choice of products for consumers. Although FDA has no information about the costs of this type of rebranding activity to the manufacturer, they are most likely substantial.

The market puts a premium on ''healthy'' brands and products. This premium reflects what consumers are willing to pay for the ''healthy'' signal. Since consumers would presumably be paying less for a less valuable product, the total effect of rebranding on consumer utility is negative but limited. However, firms have made an investment in the ''healthy'' brand based on an expected return closely related to the ''healthy'' premium consumers are willing to pay, and this investment would now be worthless if the product cannot use the ''healthy'' claim.[9] In the impacts analysis of the original regulation defining ''healthy'' (59 FR 24232 at 24247, May 10, 1994), FDA estimated that the average premium (measured as the selling price difference) that the market placed on ''healthy'' brand goods was $0.57 per 16 ounce (oz) equivalent. FDA used a Washington, DC store sample of 106 frozen meals and main dishes referred to earlier to reestimate this premium using data collected in 2000, with similar results (Ref. 15).

According to the analysis in FDA's technical memorandum (Ref. 15), the ''healthy'' brand competitor had a significant $0.32 premium over the other major health positioned producer in this market, and at least as high a premium over the other major claims producer. Adjusting for serving size (10 oz in the products sampled), the $0.32 premium translates to a $0.51 premium per 16 oz, which is very close to the $0.57 premium estimated in 1994.

We estimate the total value of each brand by multiplying the premiums and average sales volumes. According to a comment on the 2003 proposed rule, sales of ''healthy soups'' still on the market were approximately 3.64 million units per product in 2003. Under the assumption of 50 percent loss of ''healthy'' soups if the second-tier sodium level requirement were to go into effect, 15 products would be taken off the market, either by rebranding or relabeling them out of the ''healthy'' category or by discontinuing them altogether, with a total lost premium of $17.47 million per year (15 products x $0.32 premium lost x average sales of 3.64 million units per product per year).

Adding this lost utility to the cost of reformulating the other 15 ''healthy'' soup products yields a total cost estimate of $20.77 million for years one and two, and a residual of the lost premium of $17.47 million for what would have been the rest of the normal life cycle of the lost ''healthy'' claim. These costs and the costs under 25 percent and 75 percent reformulation assumptions are shown in table 1 of this document. Avoiding these costs represents a large benefit of option 2a.

*Option 2b: Retain the First-Tier Sodium Level for Meals and Main Dishes.*

Costs of Option 2b. The cost of this option, as in option 2a for individual foods, is the increased health risk due to higher sodium intake. However, FDA finds that option 2b will not significantly affect the average amount of sodium consumed in an overall diet. The net increase in sodium intake under option 2b is insubstantial even under the most favorable assumptions of the effects of the current rule. Under some plausible scenarios, the average amount of sodium consumed could remain the same or actually increase if the current rule were implemented without amendment (i.e., under option 1).

To gather data for our impact analysis, in 1999 we took a sample of 106 frozen meals and main dishes from a Washington, DC area grocery store (Ref. 15). This sample was intended to be reasonably representative of the U.S. prepared dinner market, although it may not encompass all meal and main dish choices available nationwide. We also tested these results with a second Web-based sample in 2000 (Ref. 15). Based on data collected in the grocery store sample, the market for meals and main dishes can be characterized as having three segments. The first is the bargain segment, with two or three producers that offer basic meals, usually priced from $1 to $1.50 lower than the average product on the market. The second segment, or ''normal'' market, also has two or three major producers, with prices ranging from slightly lower to the same as the health-positioned goods in the third segment. Products in the second segment appear to compete mainly on taste or price rather than health attributes, although such products sometimes make health-related or dietary claims (e.g., ''low fat''). The third segment is the ''claims'' segment, which includes the ''healthy'' branded products, low fat products, and more expensive specialty products such as organic meals and main dishes. Many of these products prominently display fat and calorie information on the front of the package; these products clearly use nutritional content as a marketing tool.

According to our analysis set forth in a technical memorandum (Ref. 15), the ''healthy'' branded goods have the lowest average sodium content among the ''claims'' brands and the lowest average sodium content on the market. On average, they have 42 mg less sodium per meal than their next lowest competitor. Both the ''healthy'' branded goods and their main competitor that does not make ''healthy'' claims have average sodium levels under the first-tier limit of 600 mg for meals and main dishes.

We explored several possible consumer and producer responses to option 2b (retaining the first-tier sodium level for meals and main dishes only) as compared with option 1 (allowing the second-tier sodium level to go into effect for all foods) in the following scenarios. If FDA adopted option 1, firms would respond to the imposition of the second-tier sodium level for meals and main dishes in a strategic way. Producers of ''healthy'' brands would either reformulate their products to meet the second-tier level, or relabel their products without the ''healthy'' claim or the ''healthy'' brand name. The concern here is the consumer response to these actions. Reformulated products may be less palatable or more expensive, leading to a loss of market share. Rebranded (or relabeled) products would no longer carry the ''healthy'' claim and therefore would not be subject to a sodium limit. Indeed, several comments expressed concern that lowering the sodium requirement to the second-tier level could encourage consumers to switch to higher sodium alternatives.

The possible scenarios are summarized in table 2 of this document.

[9] If the new definition of ''healthy'' with the second-tier sodium level is no more useful a health signal than the old definition, this lost investment is a cost to society. However, as we explain under the *Costs of Option 2a*, the health signal may be better under the second-tier sodium level for individual foods. This health signal strength may have significant value, and its loss should be netted out of the ''willingness to pay'' premium. However, FDA believes the loss in value of healthy products due to decreased strength of signal, though possibly significant, is not substantial. Therefore the ''willingness to pay'' premium estimated here, though an upper bound, should closely resemble the actual benefit of keeping these products on the market by retaining the first-tier sodium levels.

The first number in each cell is the average amount of sodium in mg and the second number in parentheses is the market share for each brand. The average sodium content amounts of 551 mg, 593 mg, 722 mg, and 856 mg per meal come from an analysis explained in the technical memorandum (Ref. 15). The ''healthy'' brand has slightly over 9 percent of the total frozen dinner meal market when measured by sales volume, and the non-''healthy'' brand 1 in the ''claims'' segment of the market has 10.5 percent. Nonfrozen meals and main dishes, including chili, are also important in the overall market, but 99 percent of the sales of the ''healthy'' brand and 100 percent of the sales of ''claims'' brand 2 are in the frozen meal category. The ''other'' brands in table 2 of this document represent the normal and bargain market segments previously described in this document. We assume that the three ''claims'' brands in this analysis are a reasonable approximation to the ''claims'' market segment as previously described in this analysis. Each of their shares in the total market is divided by the sum of the shares of the three brands in the total market, which makes their market shares in the ''claims'' segment of the market (45 percent + 52 percent + 3 percent) equal to 100 percent.

TABLE 2.—SODIUM CONSUMPTION SCENARIO ANALYSES FOR 1999 SAMPLE OF MEALS AND MAIN DISHES AS ESTIMATED IN PROPOSED RULE

| Scenario | Healthy Brand | Claim Brand 1 | Claim Brand 2 | Other | |
|---|---|---|---|---|---|
| | Sodium (Market Share) | Sodium (Market Share) | Sodium (Market Share) | | Average Sodium (mg) |
| 1. Market Before 2003 Proposed Rule | 551 (.45) | 593 (.52) | 722 (.03) | 856 (0) | 579 |
| 2. Perfect Reformulation (option 1) | 476 (.45) | 593 (.52) | 722 (.03) | 856 (0) | 544 |
| 3. Switch Point, Random Share Loss (option 1) | 476 (.45-.142) | 593 (.52+.047) | 722 (.03+.047) | 856 (.047) | 579 |
| 4. Switch Point, Equal Share Loss to Health (option 1) | 476 (.45-.193) | 593 (.52+.097) | 722 (.03+.097) | 856 (0) | 579 |
| 5. Reformulation Up (option 2b) | 600 (.45) | 593 (.52) | 722 (.03) | 856 (0) | 600 |
| 6a. Combined Response to option 1 | 480 (.45-.113) | 593 (.52+.056) | 722 (.03+.056) | 856 (0) | 566 |
| 6b. Combined Response to option 2b | 580 (.45+.04) | 593 (.52-.02) | 722 (.03-.02) | 856 (0) | 588 |
| Total Effect (6b—6a) | | | | | 22 |

Since option 1, or not amending the current rule, is the baseline for exploring the effect of option 2b, the first five scenarios are designed to demonstrate how different responses to option 1 (the current rule) and option 2b (the proposed rule) affect the average amount of sodium consumed in meals and main dishes. Scenarios 6a and 6b combine the responses in the previous scenarios in an attempt to capture the total effect of option 2b. The last row, in the last column, is the total change in sodium when comparing the response to option 2b (6b) to the response to option 1 (6a) (scenario 6-''total effect'').

*Scenario 1: The Market Before the 2003 Proposed Rule*. The first-tier sodium level applies until 2006, but firms, particularly before publication of the 2003 proposed rule, may have been trying to prepare for the second-tier sodium level, causing the average amount of sodium in the ''healthy'' products to be lower than it will be under the final rule.[10] The average ''claims'' segment meal, as reported in the last column of table 2 of this document, contained 579 mg sodium, the average ''healthy'' brand meal contained 551 mg sodium, and several ''healthy'' brand meals in this sample were under the second-tier sodium level of 480 mg sodium.

*Scenario 2: Perfect Reformulation*. Under the very optimistic perfect reformulation assumption, where the ''healthy'' manufacturer could replicate every aspect of its product except the sodium level, the sodium level of the average ''claims'' segment meal would decrease to 544 mg ((476 * 45 percent) + (593 * 52 percent) + (722 * 3 percent)) under option 1. The difference between this and the current market is 1.5 percent of the DRV for sodium, which is 2,400 mg per day (§ 101.9(c)(9)).

*Scenario 3: Random Loss of Market Share*. Some ''healthy'' brand consumers may switch to other products if manufacturers of ''healthy'' products cannot perfectly reformulate their products. In this scenario, the ''healthy'' brand loses market share to each of its competitors and to the rest of the market (''other'' brands) in equal amounts. If the loss of market share is small, sodium levels will still decline under option 1. However, the average sodium level per meal and per main dish would not change if the ''healthy'' brand lost 32 percent of its market (14 percent of the ''claims'' market) under these assumptions.

*Scenario 4: Loss of Market Share to Claims Competitors*. Consumers are likely to switch from ''healthy'' products to other products bearing claims. For example, consumers concerned with the sodium content of what they eat might switch to a product

[10] As already described in detail in this document, the baseline market conditions for the purpose of the regulatory analysis are those that existed prior to the publication of the 2003 proposed rule. Costs and benefits accrued during the rulemaking process, e.g. as a result of the publication of the 2003 proposed rule, must be accounted for in the analysis.

labeled as ''low sodium'' or ''reduced sodium.'' Since these alternatives have less sodium than the rest of the frozen foods market, the amount of ''healthy'' business lost that would still leave average sodium levels lower or unchanged would be higher than in scenario 3 under option 1. If the ''healthy'' brand lost 43 percent of its market share (which is smaller than the 45 percent of their products one major producer of ''healthy'' products stated the second-tier level would adversely affect) equally to both ''claims'' competitors, the average ''claims'' segment meal's sodium content would be unchanged at 579 mg.

*Scenario 5: Reformulation Up to First-Tier Limit.* Here, we assume only the possibility that the second-tier restrictions will become effective discourages the ''healthy'' product from increasing the amount of sodium up to the first-tier limit. Therefore, under option 2b, every ''healthy'' meal and main dish would contain 600 mg of sodium per meal.[11] The average meal and main dish in the ''claims'' market would increase to 600 mg as well, which is 21 mg per meal more than the current amount and 56 mg more than the total under scenario 2, the most optimistic, perfect reformulation total.

*Scenario 6: Total Effect.* Scenario 6, which is scenario 6a (combined total response to option 1) subtracted from scenario 6b (combined total response to option 2b), represents the agency's estimate of the total effects of option 2b, which would adopt as permanent the first-tier sodium level for ''healthy'' meals and main dishes. In scenarios 6a and 6b, we make behavioral assumptions for both option 1 and option 2b.

*Scenario 6a: Combined Total Response to Option 1.* Of the ''healthy'' meals and main dishes in this sample, 75 percent are above and 25 percent are below the second-tier sodium level of 480 mg.[12] If the second-tier sodium level were to take effect, we assume that the meals and main dishes already below 480 mg (25 percent of the total) would be reformulated up to 480 mg. Based on comments to the 1997 ANPRM, we assume that 37.5 percent of all ''healthy'' meals and main dishes (one-half of the 75 percent of ''healthy'' meals and main dishes currently above 480 mg) would be reformulated down to 480 mg of sodium without a loss of taste. An additional 19 percent of all ''healthy'' meals and main dishes (one-fourth of the 75 percent of ''healthy'' meals and main dishes currently above 480 mg) would be reformulated even though the reformulation would lead to some loss of taste. The remaining 19 percent of all healthy meals and main dishes (one fourth of the 75 percent of ''healthy'' meals and main dishes currently above 480 mg) would either have ''healthy'' removed from the label or cease being produced.

The total response of producers to the second-tier level of 480 mg would therefore be:

- Producers increase the sodium level to 480 mg for the 25 percent of ''healthy'' meals and main dishes that are currently below 480 mg of sodium.
- Producers reduce the sodium level to 480 mg for 56 percent of ''healthy'' meals and main dishes (37.5 percent with no loss of taste, 19 percent with some loss of taste).
- Producers either drop ''healthy'' from the label or cease producing 19 percent of all ''healthy'' meals and main dishes.

In this scenario, consumers respond to the loss of taste and disappearance of products by switching choices within the ''claims'' segment of the market, which includes ''healthy'' and similar meals and main dishes. They switch with equal probability to any one of the three brands in the ''claims'' segment, which means that one-third will switch to another ''healthy'' branded product and two-thirds will switch to products outside the ''healthy'' brand. The market share loss of the ''healthy'' brand is therefore 25 percent of its market, or two-thirds of the 37.5 percent of the market that experiences loss of taste, or disappearance of products. This is 11.3 percent of the total ''claims'' market. The average sodium intake implied by the market activity in this scenario under option 1 is 566 mg per meal.

*Scenario 6b: Combined Total Response to Option 2b.* We assume that producers will reformulate most, but not all, of the ''healthy'' products to the first-tier limit. We believe producers of ''healthy'' products will choose to position themselves as a slightly lower sodium alternative in this market, as they are currently positioned, but reformulate to increase sodium to improve taste. Because of improved taste, these producers increase their market share by 10 percent under this scenario, so the average sodium intake under the proposed amendment would be 588 mg per meal.

The difference between scenarios 6a and 6b gives us the difference in average sodium consumption between option 2b and option 1, the baseline. This amount, 22 mg sodium per meal, is the best estimate of the ''sodium cost'' of option 2b.

FDA's technical memorandum (Ref. 15) repeats the basic parts of this analysis for a second sample of products from the Web sites of a producer of ''healthy'' products and a ''claims'' segment producer, which we performed as a stress test[13] of the first sample conclusions. The result from this different sample of meal products is quite close to the 22 mg ''sodium cost'' calculated in scenario 6 of table 2 of this document.

According to our analysis, the sodium increase under option 2b would be insubstantial. Almost all studies linking sodium's influence on hypertension, coronary heart disease, and stroke consider the effect of a change in sodium consumption two orders of magnitude larger than these changes. A 100 millimole (mmol) (2,300 mg) difference per day is typical in both clinical and epidemiological studies; these studies do not address the relative dose-response relationship of the small sodium intake differences found in the scenarios. Even if the effect were linear (i.e., even if the health risk associated with the mg change per day in sodium under option 2b were a simple percentage of the 2,300 mg risk), the total statistical lives saved by implementing the second-tier sodium level for meals and main dishes would be less than 1 under the total effects calculation in table 2 of this document and in the results of the second sample (Ref. 15). Since FDA does not assume a linear health response to sodium intake, however, the agency concludes that the health effects from this low level of sodium increase are negligible.

*Benefits of Option 2b.* In the analysis of market data for the 2003 proposed rule, FDA identified 148 meals and main dishes labeled ''healthy'' among 10 brands (see 68 FR 8163 at 8169). Under option 1 (no amendment to the current rule), manufacturers would have to reformulate their products (meals and main dishes in this case) to meet the second-tier sodium level when the stay expires. Reformulation costs would be the lower limit of the cost to society of the current rule. If producers could reformulate perfectly, without altering any property other than sodium content, then reformulation would be the total cost of option 1. But if they could not

[11] Note that since the publication of the 2003 proposed rule, in which FDA proposed to make the first-tier sodium level for meals and main dishes permanent, many meal and main dish products may have already been reformulated to contain exactly or nearly 600 mg of sodium per meal.

[12] Again, these are numbers from 1999, before this rulemaking began. Some products may have been reformulated since then.

[13] A stress test is performed to see if the model results hold using a different data sample.

replicate the desirable characteristics of their product, consumers would also suffer the utility loss of a market with fewer meal choices.

In the product samples used for the scenario analyses regarding the cost of the second-tier sodium level for meals and main dishes, a significant percentage (around 75 percent in the store-based sample and 50 percent in the Web site sample) of the major ''healthy'' producer's products were above the second-tier sodium levels. If this sample represents the market as a whole, then approximately 74 to 111 products would need to reduce their sodium to meet the second-tier level. In estimating the total effects of the second-tier sodium level on meals and main dishes, we assumed that 56 percent, or 83 of the 148 products on the market (see scenario 6a in table 2 of this document), would be reformulated.

Preliminary testing costs incurred in the first stage of reformulation—according to comments on the ANPRM received from a frozen meal ''healthy'' brand producer that had begun investigating possible reformulation—were well over $1 million, but we do not have detailed reformulation cost estimates for meals and main dishes. Consistent with its estimate for individual foods (see discussion under ''Benefits of Option 2a''), FDA assumes that reformulating a meal or main dish would require 5,000 hours of professional time at $30 per hour, $190,000 for development and pilot plant operating expenses, and $100,000 for market testing per product. Since this reformulation would be undertaken to keep the ''healthy'' claim on an existing product, we assume negligible relabeling or marketing costs. The total reformulation costs are therefore $440,000 per product, or $36,520,000 for the 83 meals assumed to be reformulated if adopting the second-tier sodium levels for meals and main dishes under scenario 6a. Assuming 50 percent of the cost is incurred per year for 2 years, and ignoring the time discount, the cost is $18,260,000 per year.

The agency assumes that a substantial number of market participants would choose to rebrand or relabel their products out of the ''healthy'' category if it becomes too restrictive. As with option 2a, the direct costs of relabeling the product and conducting a marketing campaign would be social costs, since they represent extra investment that will not increase or improve the choice of products for consumers. Although FDA has no information about the costs of this type of rebranding activity, they are probably substantial. As discussed in the analysis of the benefits of option 2a in this document, there will also be a $0.32 per unit premium loss on ''healthy'' products no longer on the market. Sales of the brands still in the market were approximately 1.3 million units per product in 1999 (Ref. 8). Under the assumption of 19 percent loss of ''healthy'' meals and main dishes if the second-tier sodium level goes into effect (scenario 6a), 28 products would be taken off the market, either by rebranding or relabeling them out of the ''healthy'' category or by discontinuing them altogether, with a total lost premium of $11,648,000 per year (28 products x $0.32 premium lost x average sales of 1.3 million units per year).

Adding this cost to the reformulation costs of the 83 products yields a total cost estimate of $29.90 million for years one and two, and a residual of the lost premium of $11.65 million for what would have been the rest of the normal life cycle of the lost ''healthy'' brand. Avoiding these costs represents a large benefit of option 2b.

*Option 2c: Retain the First-Tier Sodium Levels for ''Healthy'' Meals and Main Dishes and Individual ''Healthy'' Foods (the Final Rule).* The benefits and costs of option 2c are close to the sum of the benefits and costs associated with options 2a and 2b. However, as explained in the discussion of option 2a, retaining the first-tier sodium levels for ''healthy'' individual foods would decrease the consistency, relative to option 2b, between sodium levels in ''healthy'' meals and main dishes and the sodium levels in meals put together by combining ''healthy'' individual foods.

*Costs of Option 2c.* The cost of this option, as with option 2a for individual foods and option 2b for meals and main dishes, is the increased risk due to higher sodium intake and the diminishing effectiveness of the ''healthy'' claim as a signal to identify products that contain strictly controlled levels of sodium. Since option 2c is essentially combining options 2a and 2b, the costs associated with a higher sodium intake are roughly the sum of the costs associated with options 2a and 2b.

As explained in detail in the discussion of option 2b of this document, the average increase in sodium intake occurring under option 2b relative to option 1 is insubstantial (roughly 22 mg per meal), and the health effects from this low level of sodium increase are negligible. Even under the conservative assumption of a linear dose response, the statistical lives saved by decreasing allowable sodium in ''healthy'' meals and main dishes to second-tier levels would be less than 1.

As discussed in detail under option 2a of this document, the potential change in sodium intake occurring under option 2a (relative to option 1) due to retaining the less restrictive first-tier level of sodium allowable in individual foods labeled as ''healthy,'' is uncertain. Because most individual foods are not restricted in formula under either sodium level, and because consumers may turn to higher sodium alternatives if the sodium level requirement becomes too restrictive for certain products (soups, cheeses, pasta sauces), the net increase in sodium will probably be small. Furthermore, the health costs due to a small increase in sodium intake will be largely mitigated by retaining a greater number of choices of relatively healthy foods (low in fat and saturated fat, controlled in cholesterol and sodium, and a good source of one or more beneficial nutrients).

Therefore, the costs of option 2c resulting from the reduced effectiveness of the ''healthy'' claim as a signal of foods with strictly controlled sodium and the health risks due to a potential increase in total sodium intake, though uncertain, are likely to be small.

*Benefits of Option 2c.* The benefits of avoiding reformulation, rebranding, and relabeling costs under this option are roughly the sum of the benefits associated with options 2a and 2b.

As discussed in the benefits section of option 2a of this document, the benefits of avoiding reformulation, rebranding, and relabeling costs by retaining first-tier sodium levels for ''healthy'' individual foods are substantial. FDA estimates the total cost avoided under option 2a to be $20.77 million for years one and two, and a residual of the lost premium of $17.47 million for what would have been the rest of the normal life cycle of the lost ''healthy'' products.

The benefits of avoiding reformulation, rebranding, and relabeling costs by retaining first-tier sodium levels for ''healthy'' meals and main dishes are also substantial. FDA estimates the total cost of reformulation and relabeling avoided under option 2b is $29.90 million for years one and two, and $11.65 million per year thereafter.

The total benefits of option 2c from the avoided reformulation and relabeling costs associated with implementing the second-tier sodium levels for both ''healthy'' meal and main dish products and ''healthy'' individual foods are equal to the sum of the benefits of options 2a and 2b: $50.67 million for years one and two, and $29.12 million per year thereafter.

*Net Benefits of Option 2c.* The net benefits of option 2c, retaining the first-tier level of sodium for both ''healthy'' meal and main dish products and ''healthy'' individual foods, are roughly the sum of the net benefits of options 2a and 2b.

Since the net benefits of retaining the first-tier sodium level for both ''healthy'' individual foods and ''healthy'' meal and main dish products are substantial and positive, FDA concludes that the net benefits of 2c, roughly the sum of the net benefits associated with 2a and 2b, are substantial and positive, and higher than the net benefits of the other options. Therefore, net benefits are maximized by option 2c, the final rule, which adopts the first-tier sodium levels for both individual foods and for meals and main dishes.

3. Summary of Benefits and Costs

This analysis attempts to use limited data to illustrate in some detail what would take place in the market under this final rule (option 2c) and other regulatory alternatives. The analysis for both ''healthy'' meals and main dishes and ''healthy'' individual foods shows that while the benefits of retaining the first-tier sodium level (the costs foregone) are substantial for companies that would need to reformulate to comply with the second-tier sodium level or rebrand and relabel themselves out of the ''healthy'' market, the health costs associated with retaining the first-tier sodium level are both unquantifiable and most likely insubstantial. The benefits of the foregone reformulation, rebranding, and relabeling costs, and the health benefits of keeping available a greater choice of goods that are simultaneously low in fat and saturated fat, controlled in cholesterol and sodium, and a good source of beneficial nutrients, clearly outweigh the costs due to a small loss in the strength of the ''healthy'' sodium signal and a small increase in average daily sodium intake. Therefore, the net benefits of the rule, which would adopt as permanent the first-tier sodium level for all foods, are positive.

*B. Small Entity Analysis*

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. FDA finds that this final rule would not have a significant economic impact on a substantial number of small entities.

This final rule makes permanent the first-tier sodium level of 600 mg for meals and main dishes and 480 mg for individual foods. Without this final rule, the more restrictive second-tier sodium levels would raise the costs of making a ''healthy'' claim on such products. If a small business were to market a ''healthy'' meal, main dish, or individual food, it would be able to do so at lower cost under the final rule than if FDA left the current rule unmodified. FDA therefore certifies that this final rule will not have a significant impact on a substantial number of small entities.

*C. Unfunded Mandates Reform Act of 1995*

Section 202(a) of the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) requires that agencies prepare a written statement that includes an assessment of anticipated costs and benefits before proposing ''any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $115 million, using the most current (2003) Implicit Price Deflator for the Gross Domestic Product. FDA does not expect this final rule to result in any 1–year expenditure that would meet or exceed this amount.

## VI. Paperwork Reduction Act of 1995

FDA concludes that this final rule contains no collections of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

## VII. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

## VIII. References

The following references have been placed on display in the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852 and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. U.S. Department of Agriculture and Department of Health and Human Services, ''Dietary Guidelines for Americans'' 5th ed., U.S. Government Printing Office, Washington, DC, 2000.

2. Dietary Reference Intakes for Water, Potassium, Sodium, Chloride, and Sulfate, chapter 6, ''Sodium and Chloride'' pp 269–423. Panel on Dietary Reference Intakes for Electrolytes and Water, Standing Committee on the Scientific Evaluation of Dietary Reference Intakes, Food and Nutrition Board, Institute of Medicine of the National Academies, The National Academies Press 2004.

3. ''Dietary Guidelines for Americans 2005'' U.S. Department of Health and Human Services, U.S. Department of Agriculture *www.healthierus.gov/dietaryguidelines.*

4. MyPyramid.gov, U.S. Department of Agriculture first available 2005 at *http://www.mypyramid.gov*

5. Letter from Carl A. Roth, Associate Director for Scientific Program Operation, to William Kovaks, Vice President Environment, Technology, & Regulatory Affairs, Chamber of Commerce of the United States of America, and Richard Hanneman, President, The Salt Institute, August 19, 2003, *http://aspe.hhs.gov/infoquality/request&response/reply_8b.shtml.*

6. Letter from Barbara Alving, Acting Director to William Kovaks, Vice President Environment, Technology, & Regulatory Affairs, Chamber of Commerce of the United States of America, and Richard Hanneman, President, The Salt Institute, February 11, 2004, *http://aspe.hhs.gov/infoquality/request&response/reply_8d.shtml.*

7. Calories Count Report of the Working Group on Obesity March 12, 2004, *http://www.cfsan.fda.gov/~dms/owg-toc.html.*

8. Anderson, Ellen M., memorandum to file, September 3, 2002.

9. Anderson, Ellen M. and Heili Kim, memorandum to file, August 30, 2001.

10. ''Healthy Choice Total Franchise Sales vs. Total Food Sales (IRI)'' Exhibit 3A to ConAgra Comment C 127 to 91N–384H.

11. ''Trends in the United States, Consumer Attitudes and the Supermarket 1996,'' Conducted for the Food Marketing Institute By Abt Associates Inc., Published by The Research Department, Food Marketing Institute, Washington, DC.

12. ''Healthy Choice Soup 2003 Taste Test Results'' Exhibit 4 to ConAgra Comment C 127 91N–384H.

13. ''Soup Category Sales Breakdown'' Exhibit 5 to ConAgra Comment C 127 to 91N–384H.

14. National Partnership for Reinventing Government, Plain Language Action Network, Presidential Memorandum on Plain Language, *http://www.plainlanguage.gov/whatisPL/govmandates/memo.cfm.*

15. Mancini, Dominic, memorandum to file, May 23, 2002.

## List of Subjects in 21 CFR Part 101

Food labeling, Nutrition, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 101 is amended as follows:

## PART 101—FOOD LABELING

■ 1. The authority citation for 21 CFR part 101 continues to read as follows:

**Authority:** 15 U.S.C. 1453, 1454, 1455; 21 U.S.C. 321, 331, 342, 343, 348, 371; 42 U.S.C. 243, 264, 271.

■ 2. Section 101.65 is amended by revising paragraph (d) to read as follows:

**§ 101.65 Implied nutrient content claims and related label statements.**

* * * * *

(d) *General nutritional claims.* (1) This paragraph covers labeling claims that are implied nutrient content claims because they:

(i) Suggest that a food because of its nutrient content may help consumers maintain healthy dietary practices; and

(ii) Are made in connection with an explicit or implicit claim or statement about a nutrient (e.g., ''healthy, contains 3 grams of fat'').

(2) You may use the term ''healthy'' or related terms (e.g., ''health,'' ''healthful,'' ''healthfully,'' ''healthfulness,'' ''healthier,'' ''healthiest,'' ''healthily,'' and ''healthiness'') as an implied nutrient content claim on the label or in labeling of a food that is useful in creating a diet that is consistent with dietary recommendations if:

(i) The food meets the following conditions for fat, saturated fat, cholesterol, and other nutrients:

| If the food is... | The fat level must be... | The saturated fat level must be... | The cholesterol level must be... | The food must contain... |
|---|---|---|---|---|
| (A) A raw fruit or vegetable | Low fat as defined in § 101.62(b)(2) | Low saturated fat as defined in § 101.62(c)(2) | The disclosure level for cholesterol specified in § 101.13(h) or less | N/A |
| (B) A single-ingredient or a mixture of frozen or canned fruits and vegetables[1] | Low fat as defined in § 101.62(b)(2) | Low saturated fat as defined in § 101.62(c)(2) | The disclosure level for cholesterol specified in § 101.13(h) or less | N/A |
| (C) An enriched cereal-grain product that conforms to a standard of identity in part 136, 137 or 139 of this chapter | Low fat as defined in § 101.62(b)(2) | Low saturated fat as defined in § 101.62(c)(2) | The disclosure level for cholesterol specified in § 101.13(h) or less | N/A |
| (D) A raw, single-ingredient seafood or game meat | Less than 5 grams (g) total fat per RA[2] and per 100 g | Less than 2 g saturated fat per RA and per 100 g | Less than 95 mg cholesterol per RA and per 100 g | At least 10 percent of the RDI[3] or the DRV[4] per RA of one or more of vitamin A, vitamin C, calcium, iron, protein, or fiber |
| (E) A meal product as defined in § 101.13(l) or a main dish product as defined in § 101.13(m) | Low fat as defined in § 101.62(b)(3) | Low saturated fat as defined in § 101.62(c)(3) | 90 mg or less cholesterol per LS[5] | At least 10 percent of the RDI or DRV per LS of two nutrients (for a main dish product) or of three nutrients (for a meal product) of: vitamin A, vitamin C, calcium, iron, protein, or fiber |
| (F) A food not specifically listed in this table | Low fat as defined in § 101.62(b)(2) | Low saturated fat as defined in § 101.62(c)(2) | The disclosure level for cholesterol specified in § 101.13(h) or less | At least 10 percent of the RDI or the DRV per RA of one or more of vitamin A, vitamin C, calcium, iron, protein or fiber |

[1] May include ingredients whose addition does not change the nutrient profile of the fruit or vegetable.
[2] RA means Reference Amount Customarily Consumed per Eating Occasion (§ 101.12(b)).
[3] RDI means Reference Daily Intake (§ 101.9(c)(8)(iv)).
[4] DRV means Daily Reference Value (§ 101.9(c)(9)).
[5] LS means Labeled Serving, i.e., the serving size that is specified in the nutrition information on the product label (§ 101.9(b)).

(ii) The food meets the following conditions for sodium:

| If the food is... | The sodium level must be... |
|---|---|
| (A) A food with a RA that is greater than 30 g or 2 tablespoons (tbsp.) | 480 mg or less sodium per RA and per LS |
| (B) A food with a RA that is equal to or less than 30 g or 2 tbsp. | 480 mg or less sodium per 50 g[1] |
| (C) A meal product as defined in § 101.13(l) or a main dish product as defined in § 101.13(m) | 600 mg or less sodium per LS |

[1] For dehydrated food that is typically reconstituted with water or a liquid that contains insignificant amounts per RA of all nutrients (as defined in § 101.9(f)(1)), the 50 g refers to the ''prepared'' form of the product.

(iii) The food complies with the definition and declaration requirements in this part 101 for any specific nutrient content claim on the label or in labeling, and

(iv) If you add a nutrient to the food specified in paragraphs (d)(2)(i)(D), (d)(2)(i)(E), or (d)(2)(i)(F) of this section to meet the 10 percent requirement, that addition must be in accordance with the fortification policy for foods in § 104.20 of this chapter.

Dated: September 23, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–19511 Filed 9–28–05; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF THE INTERIOR

## Minerals Management Service

## 30 CFR Parts 216 and 218

**RIN 1010–AD28**

## Royalty Payment and Royalty and Production Reporting Requirements Relief for Federal Oil and Gas Lessees Affected by Hurricane Katrina or Hurricane Rita

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Final rule.

**SUMMARY:** The Minerals Management Service (MMS) is publishing a final rule to provide immediate temporary relief to reporters in the aftermath of Hurricanes Katrina and Rita. The final rule provides an extension to pay royalties owed on Federal oil and gas leases and report corresponding royalty and production reports. On August 29, 2005, Hurricane Katrina struck the Gulf of Mexico coast of the United States. Subsequently, in late September 2005, Hurricane Rita struck the Gulf Coast. Both hurricanes caused extensive damage to areas in which a number of Federal oil and gas lessees, particularly lessees of offshore leases, have their offices and principal operations. This final rule extends the due date for monthly royalty payments and reports and monthly operations reports for Federal oil and gas lessees, royalty payors, and operators whose operations have been disrupted by one or both of the hurricanes to the extent that the lessee, payor, or operator is prevented from submitting accurate payments or accurate reports. Extending the due date for royalty payments means that late payment interest will not accrue for the period between the original due date and the new due date established by this rule.

**DATES:** Effective date: September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Sharron L. Gebhardt, Lead Regulatory Specialist, Minerals Revenue Management (MRM), Minerals Management Service, P.O. Box 25165, MS 302B2, Denver, Colorado 80225; telephone (303) 231–3211; FAX (303) 231–3781; e-mail *sharron.gebhardt@mms.gov.* The principal authors of this final rule are Geoffrey Heath of the Office of the Solicitor and Robert Prael of MRM, MMS, U.S. Department of the Interior.

**SUPPLEMENTARY INFORMATION:**

### I. Background

*A. Lease Royalty Reporting, Royalty Payment and Production Reporting Obligations*

Applicable regulations and the terms of Federal oil and gas leases prescribe the dates by which lessees must pay royalty and by which they must submit required royalty reports. Specifically, 30 CFR 218.50(a) requires:

Royalty payments are due at the end of the month following the month during which the oil and gas is produced and sold except when the last day of the month falls on a weekend or holiday. In such cases, payments are due on the first business day of the succeeding month. * * *

The terms of almost all onshore and offshore Federal oil and gas leases likewise provide that royalty is due at the end of the month following the month of production.

Section 111(a) of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), 30 U.S.C. 1721(a), prescribes that lessees must pay interest on royalty payments received after the due date. Section 1721(a) provides in relevant part:

(a) In the case of oil and gas leases where royalty payments are not received by the Secretary *on the date that such payments are due*, or are less than the amount due, the Secretary shall charge interest on such *late payments* or underpayments at the rate applicable under section 6621 of the Internal Revenue Code * * *. (Emphasis added.)

Implementing MMS regulations at 30 CFR 218.54 prescribe in relevant part:

(a) An interest charge shall be assessed on unpaid and underpaid amounts *from the date the amounts are due.*

* * * * *

(c) Interest will be charged only on the amount of the payment not received. *Interest will be charged only for the number of days a payment is late.* (Emphasis added.)

Title 30 CFR 210.52 prescribes similar requirements for the reports that accompany royalty payments. It provides in relevant part:

(a) You must submit a completed Form MMS–2014 (Report of Sales and Royalty Remittance) to MMS with:

(1) All royalty payments * * *

* * * * *

(c) Completed Forms MMS–2014 for royalty payments are due by the end of the month following the production month.

Thus, for all Federal oil and gas leases onshore and on the Outer Continental Shelf, both royalty payments and royalty reports are due at the end of the month following the month of production.

Title 30 CFR 216.53 prescribes similar requirements for production reporting. It provides in relevant part:

(a) You must file an Oil and Gas Operations Report [OGOR], Form MMS–4054, if you operate one of the following that contains one or more wells that are not permanently plugged or abandoned:

(1) An OCS lease or federally-approved agreement; or

(2) An onshore Federal or Indian lease or federally-approved agreement for which you elected to report on a Form MMS–4054 instead of a Form MMS–3160.

* * * * *

(c) * * *

| If you submit your form | We must receive it by |
|---|---|
| (1) Electronically | The 25th day of the second month following the month for which you are reporting. |
| (2) Other than electronically | The 15th day of the second month following the month for which you are reporting. |

For operators of Federal onshore leases who do not report on the Form MMS–4054, section 216.50(c) contains filing deadlines for the Form MMS–3160 (Monthly Report of Operations) that are identical for the OGOR under section 216.53(c).

The mineral leasing laws grant the Secretary broad authority to promulgate rules and regulations. See the Outer Continental Shelf Lands Act, at 43 U.S.C. 1334(a) (offshore leases); the Mineral Leasing Act, at 30 U.S.C. 189 (onshore public domain leases); and the Mineral Leasing Act for Acquired Lands, at 30 U.S.C. 359 (onshore acquired lands leases).

*B. The Impact of Hurricane Katrina and Hurricane Rita*

Hurricane Katrina came ashore on the coast of the Gulf of Mexico on August 29, 2005. The resulting floods had a devastating impact on the area of New Orleans, Louisiana, among other areas. The entire City of New Orleans and some of the surrounding area have been evacuated, and most of the city is still without power, water, and essential services. The business district of the city and many other areas of the metropolis have been rendered uninhabitable for the present.

Subsequently, Hurricane Rita came ashore on the Gulf Coast in late September 2005. This hurricane resulted in further serious damage to areas of the United States where Federal oil and gas lessees maintain offices from which the reports and payments described above are produced.

Several reporters for Federal oil and gas leases (particularly for Federal offshore leases), had their principal offices, from which they generated and sent royalty reports and payments, located in areas affected by one or both hurricanes. Based on current information and conversations with the personnel of a number of oil and gas lessees and operators, MMS's understanding is that several oil and gas lessees and operators have completely lost use of their offices and associated facilities and records. Until access to buildings, records, data, and communications lines are restored, these parties are simply unable to generate or transmit royalty reports and royalty payments or monthly operations reports.

## II. Explanation of the Provisions of This Final Rule

Under the circumstances described above, MMS believes it is equitable to provide temporary relief from royalty payment and report due dates for lessees of Federal oil and gas leases whose payment and reporting operations have been disrupted by either or both of these hurricanes. This relief does not extend to reporting or payments due on Indian leases or to Federal leases for minerals other than oil and gas. (In addition, this rule does not address annual rental payments.) The relief is intended to give payors a reasonable period of time to restore normal operations. Postponing the royalty payment due date means that late payment interest will not accrue during the period between the due date that would have applied in the absence of this rule and the new due date established under this rule.

For lessees who make the required certification discussed below, the new due date for royalties and corresponding royalty reports (Form MMS–2104) for the production months of July, August, September, and October 2005 will be January 3, 2006 (because December 31, 2005, falls on a weekend). (In the absence of this rule, the due dates for royalty payments and reports for the production months of July, August, September, and October 2005 would have been August 31, September 30, October 31, and November 30, respectively.) The new due date for the production reports (the OGOR, Form MMS–4054) or the Monthly Report of Operations for onshore leases (Form MMS–3160) for the production months of July, August, and September 2005 will be December 15, 2005 (if you do not file electronically) or December 27, 2005 (if you file electronically, in view of the fact that December 25 falls on a weekend and December 26 is a holiday for agency personnel). (In the absence of this rule, the due dates for OGORs or monthly operations reports for the production months of July, August, and September 2005 would have been September 15 or 26, October 17 or 25, and November 15 or 25, respectively.)

To avail itself of this relief, a lessee, royalty payor, or operator will have to certify that a hurricane that struck the Gulf of Mexico coast of the United States in either August 2005 or September 2005 (*i.e.*, either Hurricane Katrina or Hurricane Rita) disrupted the lessee or payor's operations to the extent that it prevented the lessee or payor from making an accurate royalty payment or submitting an accurate royalty report, or prevented the lessee or operator from submitting an accurate operations report.

While MMS anticipates that virtually all oil and gas lessees generate royalty reports and transmit payments at one location, a lessee's or payor's certification that it is unable to generate and submit either an accurate royalty report or an accurate royalty payment will allow the lessee or payor to claim relief from both the royalty reporting and royalty payment deadlines. The reason for this is twofold. First, if a lessee can pay but cannot report, it serves no purpose to require the lessee to pay. Without the accompanying report, MMS does not know the leases and production months for which the payment is made. The MMS therefore is unable to account for and disburse the payment properly. Second, if the lessee can generate the report but cannot pay, there is no purpose for requiring the lessee to submit the report. The MMS could process the report, but it cannot move money that it has not received. It would then require manual intervention to prevent the automated system from generating a late payment interest bill when MMS receives the payment later.

If MMS believes that a lessee's, royalty payor's, or operator's certification is not justified under the lessee's or payor's or operator's circumstances, MMS may reject the certification. If MMS notifies the lessee, royalty payor, or operator that MMS does not accept the certification, then the lessee must report or pay, as applicable, by the date MMS specifies in the notice. Failure to report or pay by the prescribed date could subject the lessee or payor to civil penalties under 30 U.S.C. 1719 or 43 U.S.C. 1350, as applicable.

Under the Administrative Procedure Act, 5 U.S.C. 553(b)(B), publication of a proposed rule and an opportunity for public comment are required before an agency promulgates a rule, except:

(B) When the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules

issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Under the regulations and lease terms discussed above, royalty payments for the production month of July 2005 were due on August 31, 2005, two days after Hurricane Katrina hit the Gulf Coast. Royalty payments and reports for the production month of August 2005 are due on September 30, 2005. The need to provide relief from the royalty payment and reporting deadlines is immediate, and the very short time involved will not permit solicitation, receipt, and evaluation of comments before promulgating a final rule. The MMS therefore for good cause finds that notice and public comment on this rulemaking is impracticable and contrary to the public interest.

The Administrative Procedure Act, at 5 U.S.C. 553(d) further provides:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

As explained above, the need for relief for payors who qualify for relief under this rule is immediate and arises in much less than 30 days. Payors would be unnecessarily harmed if MMS were not to make this rule effective immediately. Therefore, MMS for good cause finds that this rule should take effect immediately.

**III. Procedural Matters**

*1. Summary Cost and Royalty Impact Data*

We summarize below the estimated costs and benefits of this final rule to all potentially affected groups: industry, State and local governments, Indian tribes and individual Indian mineral owners, and the Federal Government.

A. Industry

*Small Business Issues.* Approximately 2,500 companies report and pay bonuses, rents, and royalties to MMS. We estimate that over 97 percent of these companies are small businesses, as defined by the U.S. Small Business Administration, because they have 500 or fewer employees. The MMS estimates that this final rule will not impose any additional burden on small businesses.

B. State and Local Governments

The MMS estimates that this final rule may cause a potential delay in royalty disbursements to a few states. The MMS has been notified by several companies that Hurricane Katrina and Hurricane Rita mainly impacted their ability to report and pay on offshore and onshore Federal oil and gas leases.

C. Indian Tribes and Individual Indian Mineral Owners

This final rule will not impose any additional burden on Indian tribes and individual Indian mineral owners. The relief provided in this rule does not extend to reporting or payments due on Indian leases.

D. Federal Government

The MMS estimates that there will not be a significant annual revenue loss due to this final rule. The MMS estimates there will be minimal impacts to manually prevent inappropriate interest billings.

*2. Regulatory Planning and Review, Executive Order 12866*

In accordance with the criteria in Executive Order 12866, this final rule is not a significant regulatory action as it does not exceed the $100 million threshold. The Office of Management and Budget makes the final determination under Executive Order 12866.

1. This final rule does not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis is not required.

2. This final rule does not create inconsistencies with other agencies' actions.

3. This final rule does not materially affect entitlements, grants, user fees, loan programs, or the right and obligations of their recipients.

4. This final rule does not raise novel legal or policy issues.

*3. Regulatory Flexibility Act*

I certify that this final rule does not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). An initial Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

*Your comments are important.* The Small Business and Agricultural Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. You may comment to the Small Business Administration without fear of retaliation. Disciplinary action for retaliation by an MMS employee may include suspension or termination from employment with the Department of the Interior.

*4. Small Business Regulatory Enforcement Fairness Act (SBREFA)*

This final rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This final rule:

1. Does not have an annual effect on the economy of $100 million or more. See the above analysis titled ''Summary of Costs and Royalty Impacts.''

2. Does not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

3. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*5. Unfunded Mandates Reform Act*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

1. This final rule does not ''significantly or uniquely'' affect small governments. Therefore a Small Government Agency Plan is not required.

2. This final rule does not produce a Federal mandate of $100 million or greater in any year, *i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

*6. Government Actions and Interference With Constitutionality Protected Property Rights (Takings), Executive Order 12630*

In accordance with Executive Order 12630, this final rule does not have significant takings implications. A takings implication assessment is not required.

*7. Federalism, Executive Order 13132*

In accordance with Executive Order 13132, this final rule does not have federalism implications. A federalism summary impact statement is not required. It will not substantially and directly affect the relationship between Federal and State Governments. The management of Federal leases is the responsibility of the Secretary of the Department of the Interior. Royalties

collected from Federal leases are shared with state governments on a percentage basis as prescribed by law. This final rule does not alter any lease management or royalty sharing provisions. This final rule does not impose costs on states or localities.

*8. Civil Justice Reform, Executive Order 12988*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this final rule does not unduly burden the judicial system and does meet the requirements of § 3(a) and 3(b)(2) of the Order.

*9. Paperwork Reduction Act of 1995*

The certifications contained in §§ 216.50 (i)(2) and 218.50(d)(2) do not require approval under the Paperwork Reduction Act because they do not meet the definition of information collection contained in 5 CFR 1320.3 (h)(1). Under this definition, solicitations of names, addresses and basic certifications do not require approval. Parts 210, 216, and 218 contain the following information collections, as defined by the Paperwork Reduction Act of 1995 (PRA):

- 1010–0139, 30 CFR Part 216, Production Accounting, Subparts A and B; and Part 210, Forms and Reports, expires August 31, 2006.
- 1010–0140, 30 CFR Part 210—Forms and Reports (Form MMS–2014, Report of Sales and Royalty Remittance), expires October 31, 2006.

*10. National Environmental Policy Act (NEPA)*

We have analyzed this final rule in accordance with the criteria of the National Environmental Policy Act and 516 DM. We determined this final rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental impact statement is not required.

*11. Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2, we have evaluated potential effects on federally recognized Indian tribes and have determined that the effects of this final rule will have no impact on Indian tribes. This relief does not extend to reporting or payments due on Indian leases.

*12. Consultation and Coordination With Indian Tribal Governments, Executive Order 13175*

In accordance with Executive Order 13175, this final rule does not have tribal implications that impose changes in the delegations between the MMS and the tribes. In addition, this final rule has no implications on individual Indian mineral owners. This relief does not extend to reporting or payments due on Indian leases.

*13. Effects on the Nation's Energy Supply, Distribution, or Use, Executive Order 13211*

In accordance with Executive Order 13211, this regulation does not have a significant adverse effect on the Nation's energy supply, distribution, or use.

*14. Clarity of This Regulation*

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? A ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, § 204.200. (5) What is the purpose of this part? (6) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the rule?

(7) What else could we do to make the rule easier to understand?

Send a copy of any comments that concern how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You may also e-mail the comments to this address: *Exsec@ios.doi.gov*.

**List of Subjects in 30 CFR Parts 216 and 218**

Hurricane Katrina, Hurricane Rita, relief, payor, reporter, report, royalty, production.

Dated: September 23, 2005.

**Chad Calvert,**

*Acting Assistant Secretary for Land and Minerals Management.*

■ For the reasons explained in the preamble, MMS amends parts 216 and 218 of title 30 of Code of Federal Regulations as set forth below.

## PART 216—PRODUCTION ACCOUNTING

■ 1. The authority for part 216 continues to read as follows:

**Authority:** 5 U.S.C. 301 *et seq.*; 25 U.S.C. 396 *et seq.*, 2107; 30 U.S.C. 189, 190, 359, 1023, 1751(a); 31 U.S.C. 3716, 9701; 43 U.S.C. 1334, 1801 *et seq.*; and 44 U.S.C. 3506(a).

■ 2. In § 216.53, paragraphs (e) and (f) are added as follows:

**§ 216.53 Oil and gas operations report.**

* * * * *

(e)(1) Notwithstanding the provisions of paragraph (c) of this section and § 216.50, the due date for submittal of the Oil and Gas Operations Report (Form MMS–4054) or Monthly Report of Operations (Form MMS–3160) for the production months of July, August, and September 2005 for Federal offshore and onshore oil and gas leases by oil and gas lessees or operators who make the certification required under paragraph (e)(2) of this section is extended to December 15, 2005 (if you do not file electronically) or December 27, 2005 (if you file electronically).

(2) The extended due dates in paragraph (e)(1) of this section will apply to Oil and Gas Operations Reports (Form MMS–4054) and Monthly Reports of Operations (Form MMS–3160) by any lessee or operator who certifies that a hurricane that struck the Gulf of Mexico coast of the United States in August or September 2005 disrupted the lessee's or operator's operations to the extent that it prevented the lessee or operator from submitting an accurate Form MMS–4054 or MMS–3160.

(3) Paragraphs (e)(1) and (e)(2) of this section do not apply to Indian leases or to Federal leases for minerals other than oil and gas.

(4) Certifications under paragraph (e)(2) of this section should be submitted either:

(i) By mail to: Robert Prael, Financial Manager, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 350B1, Denver, CO 80225–0165, or

(ii) By e-mail to *Robert.Prael@mms.gov*.

(f)(1) A lessee or operator who submits a certification required under paragraph (e)(2) of this section may rely on the extended due dates prescribed in paragraph (e)(1) of this section unless and until MMS notifies the lessee or operator that MMS does not accept the certification.

(2) If MMS notifies a lessee or operator that MMS does not accept the lessee's or operator's certification under paragraph (e)(2) of this section, the due date for the Oil and Gas Operations Report or Monthly Report of Operations will be the date specified in the notice.

## PART 218—COLLECTION OF ROYALTIES, RENTALS, BONUSES AND OTHER MONIES DUE THE FEDERAL GOVERNMENT

■ 3. The authority for part 218 continues to read as follows:

**Authority:** 25 U.S.C. 396 *et seq.*, 396a *et seq.*, 2101 *et seq.*; 30 U.S.C. 181 *et seq.*, 351 *et seq.*, 1001 *et seq.*, 1701 *et seq.*; 31 U.S.C. 3335; 43 U.S.C. 1301 *et seq.*, 1331 *et seq.*, and 1801 *et seq.*

■ 4. In § 218.50, paragraphs (d) and (e) are added to read as follows:

**§ 218.50 Timing of payment.**

* * * * *

(d)(1) Notwithstanding the provisions of paragraph (a) of this section and corresponding lease terms and 30 CFR 210.52, the due date for submittal of royalty payments and Reports of Sales and Royalty Remittance (Form MMS–2014) for the production months of July, August, September, and October 2005 for Federal offshore and onshore oil and gas leases by oil and gas lessees or royalty payors who make the certification required under paragraph (d)(2) of this section is extended until January 3, 2006.

(2) The extended due dates in paragraph (d)(1) of this section will apply to royalty payments and Reports of Sales and Royalty Remittance (Form MMS–2014) by any lessee or royalty payor who certifies that a hurricane that struck the Gulf of Mexico coast of the United States in August or September 2005 disrupted the lessee's or payor's operations to the extent that it prevented the lessee or royalty payor from making an accurate royalty payment or submitting an accurate Form MMS–2014.

(3) A lessee's or royalty payor's certification under paragraph (d)(2) of this section that it is unable to generate and submit either an accurate royalty report or an accurate royalty payment will extend the due date for both royalty reporting and royalty payment.

(4) Paragraphs (d)(1) through (d)(3) of this section do not apply to Indian leases or to Federal leases for minerals other than oil and gas.

(5) Certifications under paragraph (d)(2) of this section should be submitted either:

(i) By mail to: Robert Prael, Financial Manager, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 350B1, Denver, CO 80225–0165, or

(ii) By e-mail to *Robert.Prael@mms.gov*.

(e)(1) A lessee or royalty payor who submits a certification required under paragraph (d)(2) of this section may rely on the extended due dates prescribed in paragraph (d)(1) of this section unless and until MMS notifies the lessee or royalty payor or operator that MMS does not accept the certification.

(2) If MMS notifies the lessee or royalty payor that MMS does not accept the lessee's or royalty payor's certification under paragraph (d)(2) of this section, the due date for royalty payments and Reports of Sales and Royalty Remittance will be the date specified in the notice.

[FR Doc. 05–19533 Filed 9–28–05; 8:45 am]

BILLING CODE 4310–MR–P

## DEPARTMENT OF THE INTERIOR

### Minerals Management Service

### 30 CFR Parts 250 and 282

**RIN 1010–AC47**

### Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Plans and Information

**AGENCY:** Minerals Management Service (MMS), Interior.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** MMS is delaying until January 1, 2006, the effective date of a rule that regulates plans and information that lessees and operators must submit in connection with oil and gas exploration, development and production on the Outer Continental Shelf (OCS). This delay is necessary because of damage in the New Orleans area caused by Hurricane Katrina and subsequent flooding. This temporary delay will provide relief to the government and the oil and gas industry as they recover from this disaster.

**EFFECTIVE DATE:** The effective date of the rule amending 30 CFR Parts 250 and 282 published at 70 FR 51478, August 30, 2005, is delayed until January 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Kumkum Ray, Offshore Regulatory Programs (703) 787–1604.

**SUPPLEMENTARY INFORMATION:** The rule on Plans and Information that was published in the **Federal Register** on August 30, 2005 (70 FR 51478) provides that MMS will also publish a Notice to Lessees (NTL) to provide further guidance. The primary office responsible for developing the NTL, the MMS Gulf of Mexico Regional Office in New Orleans, Louisiana, has been temporarily moved since Hurricane Katrina and the flooding that followed that disaster. While critical functions have been continuously maintained, a portion of the associated staff and systems are expected to require two months to become fully functional. Moreover, many of the lessees and operators subject to the rule are similarly engaged in the restoration of normal operations following Hurricane Katrina. Lessees and operators will be making changes in their own procedures to comply with the rule. Lessees and operators whose operations have been interrupted as a result of the hurricane may not be able to make these changes until normal operations resume. Accordingly, the Department of the Interior is postponing the effective date of the final rule and the accompanying NTL until January 1, 2006.

Dated: September 23, 2005.

**Chad Calvert,**

*Assistant Secretary—Land and Minerals Management.*

[FR Doc. 05–19532 Filed 9–28–05; 8:45 am]

BILLING CODE 4310–MR–P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 62

**[RO4–OAR–2005–NC–0003–200532(a); FRL–7976–5]**

### Approval and Promulgation of State Plan for Designated Facilities and Pollutants; North Carolina

**AGENCY:** Environmental Protection Agency (EPA)

**ACTION:** Direct final rule.

**SUMMARY:** EPA is approving the Clean Air Act (CAA) section 111(d)/129 State Plan submitted by the North Carolina Department of Environment and Natural Resources (North Carolina DENR) for the State of North Carolina on August 7, 2002, and subsequently revised on December 14, 2004 (State Plan). The State Plan is for implementing and enforcing the Emissions Guidelines (EG) applicable to existing Commercial and Industrial Solid Waste Incineration (CISWI) Units that commenced construction on or before November 30, 1999.

**DATES:** This direct final rule will be effective November 28, 2005 unless EPA receives adverse comments by October

31, 2005. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

**ADDRESSES:** Submit your comments, identified by Regional Material in EDocket (RME) ID No. RO4–OAR–2005–NC–0003, by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

2. Agency Web site: *http://docket.epa.gov/rmepub/* RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select ''quick search,'' then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. E-mail: *Majumder.joydeb@epa.gov*.

4. Fax: (404) 562–9164.

5. Mail: ''RO4–OAR–2005–NC–0003'', Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960.

6. Hand Delivery or Courier. Deliver your comments to: Joydeb Majumder, Air Toxics and Monitoring Branch 12th floor, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

*Instructions:* Direct your comments to RME ID No. RO4–OAR–2005–NC–0003. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://docket.epa.gov/rmepub/*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov, or e-mail. The EPA RME Web site and the federal regulations.gov Web site are ''anonymous access'' systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the electronic docket are listed in the RME index at *http://docket.epa.gov/rmepub/*. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in RME or in hard copy at the Air Toxics Assessment and Implementation Section, Air Toxics and Monitoring Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Joydeb Majumder at (404) 562–9121.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On December 1, 2000, pursuant to CAA sections 111 and 129, EPA promulgated new source performance standards (NSPS) applicable to new CISWI units and EG applicable to existing CISWI units. The NSPS and EG are codified at 40 CFR part 60, subparts CCCC and DDDD, respectively. Subparts CCCC and DDDD regulate the following: Particulate matter, opacity, sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, cadmium, mercury, and dioxins and dibenzofurans.

For existing sources, CAA section 129(b)(2) requires states to submit to EPA for approval State Plans that implement and enforce the EG contained in 40 CFR part 60, subpart DDDD. State Plans must be at least as protective as the EG, and become Federally enforceable upon approval by EPA. Pursuant to subpart DDDD, State Plans must include the following nine items: An inventory of affected CISWI units; an inventory of emissions from affected CISWI units; compliance schedules for each affected CISWI unit; emission limitations, operator training and qualification requirements, a waste management plan, and operating limits for affected CISWI units; performance testing, record keeping, and reporting requirements; certification that a public hearing was held; provision for State progress reports to EPA; identification of enforceable State mechanisms for implementing the emission guidelines; and a demonstration of the State's legal authority to carry out the State Plan. The procedures for adoption and submittal of State Plans are codified in 40 CFR part 60, subpart B.

In this action, EPA is approving the State Plan for existing CISWI units submitted by North Carolina DENR because it meets the requirements of 40 CFR part 60, subpart DDDD.

## II. Discussion

North Carolina DENR's 111(d) / 129 State Plan for implementing and enforcing the EG for existing CISWI units includes the following: Public Participation-Demonstration that the Public Had Adequate Notice and Opportunity to Submit Written Comments and Attend Public Hearing; Emissions Standards and Compliance Schedules; Emission Inventories, Source Surveillance, and Reports; and Legal Authority. EPA's approval of the State Plan is based on our finding that it meets the nine requirements of 40 CFR part 60, subpart DDDD.

*Requirements (1) and (2):* Inventory of affected CISWI units and inventory of emissions. North Carolina DENR submitted an emissions inventory of all designated pollutants for existing CISWI units under their jurisdiction in the State of North Carolina. This portion of the State Plan has been reviewed and approved as meeting the Federal requirements for existing CISWI units.

*Requirement (3):* Compliance schedules for each affected CISWI unit. North Carolina DENR submitted the compliance schedule for existing CISWI units under their jurisdiction in the State of North Carolina. This portion of the State Plan has been reviewed and approved as being at least as protective as Federal requirements for existing CISWI units.

*Requirement (4):* Emission limitations, operator training and qualification requirements, a waste management plan, and operating limits for affected CISWI units. North Carolina DENR adopted all emission standards and limitations applicable to existing CISWI units. These standards and limitations have been approved as being at least as protective as the Federal requirements contained in subpart DDDD for existing CISWI units.

*Requirement (5):* Performance testing, recordkeeping, and reporting requirements. The State Plan contains requirements for monitoring, recordkeeping, reporting, and compliance assurance. This portion of the State Plan has been reviewed and approved as being at least as protective as the Federal requirements for existing CISWI units. The North Carolina DENR State Plan also includes its legal authority to require owners and operators of designated facilities to maintain records and report on the nature and amount of emissions and any other information that may be necessary to enable North Carolina DENR to judge the compliance status of the facilities in the State Plan. North Carolina DENR also submitted its legal authority to provide for periodic inspection and testing and provisions for making reports of existing CISWI unit emissions data, correlated with emission standards that apply, available to the general public.

*Requirement (6):* Certification that a public hearing was held. North Carolina DENR provided certification that a public hearing was held on January 7, 2002.

*Requirement (7):* Provision for State progress reports to EPA. The North Carolina DENR State Plan provides for progress reports of plan implementation updates to EPA on an annual basis. These progress reports will include the required items pursuant to 40 CFR part 60, subpart B. This portion of the State Plan has been reviewed and approved as meeting the Federal requirement for State Plan reporting.

*Requirement (8):* Identification of enforceable State mechanisms for implementing the Emission Guidelines. An enforcement mechanism is a legal instrument by which the North Carolina DENR can enforce a set of standards and conditions. The North Carolina DENR has adopted 40 CFR part 60, subpart DDDD, into 15A North Carolina Administrative Code (NCAC) 2D.1210, of the North Carolina Air Regulations for the Prevention, Abatement, and Control of Air Contaminants. Therefore, North Carolina DENR's mechanism for enforcing the standards and conditions of 40 CFR part 60, subpart DDDD, is Rule 15A NCAC 2D.1210. On the basis of this rule and the rules identified in Requirement (9) below, the State Plan is approved as being at least as protective as the Federal requirements for existing CISWI units.

*Requirement (9):* A demonstration of the State's legal authority to carry out the State Plan. North Carolina DENR demonstrated legal authority to adopt emissions standards and compliance schedules for designated facilities; authority to enforce applicable laws, regulations, standards, and compliance schedules, and authority to seek injunctive relief; authority to obtain information necessary to determine whether designated facilities are in compliance with applicable laws, regulations, standards, and compliance schedules, including authority to require record keeping and to make inspections and conduct tests at designated facilities; authority to require owners or operators of designated facilities to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amount of emissions from such facilities; and authority to make emissions data publicly available.

North Carolina DENR cites the following references for the legal authority noted above: Adopt emission standards and compliance schedules—North Carolina General Statutes (N.C.G.S.) § 143–215.107(a)(3), (5), (10), and N.C.G.S. § 143–214.108(c)(1); enforce applicable laws, regulations, standards, and compliance schedules and seek injunctive relief—N.C.G.S. § 143–215.114A, N.C.G.S. § 143–215.114C, N.C.G.S. § 143–215.69, and N.C.G.S. § 143–215.3(a)(12); obtain information necessary to determine compliance—N.C.G.S. § 143–215.107(a)(4), N.C.G.S. § 143–215.107(a)(2), and N.C.G.S. § 143–215.63–69; require record keeping, make inspections, and conduct tests—N.C.G.S. § 143–215.3(a)(2), N.C.G.S. § 143–215.63–69, and N.C.G.S. § 143–215.108(d)(1); require the use of monitors and require emission reports of owners or operators—N.C.G.S. § 143–215.3(a)(2), N.C.G.S. §§ 143–215.63—69, N.C.G.S. § 143–215.107(a)(4), N.C.G.S. § 143–215.107(a)(10), N.C.G.S. § 143–215.108(c)(1), and N.C.G.S. § 143–215.108(c)(5); and make emissions data publicly available—N.C.G.S. §§ 132–1, et seq, and N.C.G.S. § 143–215.3(a)(2).

EPA is approving the State Plan for existing CISWI units submitted by North Carolina DENR because it meets the nine requirements of 40 CFR part 60, subpart DDDD.

## III. Final Action

In this action, EPA approves the 111(d)/129 State Plan submitted by North Carolina DENR for the State of North Carolina to implement and enforce 40 CFR part 60, subpart DDDD, as it applies to existing CISWI units. EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the State Plan should adverse comments be filed. This rule will be effective November 28, 2005 without further notice unless the Agency receives adverse comments by October 31, 2005.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on November 28, 2005 and no further action will be taken on the proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

### *Statutory and Executive Order Reviews*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this rule is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond

that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This rule also does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing 111(d)/129 plan submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a 111(d)/129 plan submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a 111(d)/129 plan submission, to use VCS in place of a 111(d)/ 129 plan submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by November 28, 2005. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This rule may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects 40 CFR Part 62**

Environmental protection, Air pollution control, Commercial and industrial solid waste incineration units, Nitrogen dioxide, Particulate matter, and Sulfur oxides.

Dated: September 19, 2005.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

■ Chapter I, title 40 of the Code of Federal Regulation is amended as follows:

## PART 62—[AMENDED]

■ 1. The authority citation for part 62 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

### Subpart II—North Carolina

■ 2. Subpart II is amended by adding an undesignated center heading and § 62.8355 to read as follows:

**Air Emissions From Commercial and Industrial Solid Waste Incineration (CISWI) Units—Section 111(d)/129 Plan**

**§ 62.8355 Identification of sources.**

The Plan applies to existing Commercial and Industrial Solid Waste Incineration Units that Commenced Construction On or Before November 30, 1999.

[FR Doc. 05–19352 Filed 9–28–05; 8:45 am]

BILLING CODE 6560–50–P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 15

**[ET Docket No. 04–37; ET Docket No. 03–104; FCC 04–245]**

### Broadband Power Line Systems

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; announcement of effective date.

**SUMMARY:** The Commission adopted new requirements and measurement guidelines for a new type of carrier current system that provides access to broadband services using electric utility companies over power lines. Certain rules contained new information collection requirements and were published in the **Federal Register** on January 7, 2005. This document announces the effective date of these published rules.

**DATES:** The amendments to §§ 15.615(a) through (e) published at 70 FR 1360, January 7, 2005, became effective on July 22, 2005.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Brooks, Office of Engineering and Technology, Policy and Rules Division, (202) 418–2454.

**SUPPLEMENTARY INFORMATION:** On July 22, 2005, the Office of Management and Budget (OMB) approved the information collection requirements contained in Sections 15.615(a) through (e) pursuant to OMB Control No. 3060–1087. Accordingly, the information collection requirements contained in these rules became effective on February 7, 2005.

**List of Subjects in 47 CFR Part 15**

Communications equipment, Radio.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

[FR Doc. 05–19515 Filed 9–28–05; 8:45 am]

BILLING CODE 6712–01–P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Part 1805

**RIN 2700–AD18**

### Announcement of Contract Awards

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the NASA FAR Supplement (NFS) by amending the anticipated value at

which public announcements are required from $25M million or greater to $5 million or greater.

**EFFECTIVE DATE:** September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Sheryl Goddard, NASA, Office of Procurement, Program Operations Division; (703) 553–2519; e-mail: *Sheryl.Goddard@nasa.gov*.

**SUPPLEMENTARY INFORMATION:** The NASA HQ Office of Strategic Communications is extending the notification process to Members of Congress and the public for all new contract actions with anticipated values $5 million or greater. This final rule implements this change.

### A. Regulatory Flexibility Act

This final rule does not constitute a significant revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comment is not required. However, NASA will consider comments from small entities concerning the affected NFS Part 1805 in accordance with 5 U.S.C. 610.

### B. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Part 1805

Government Procurement.

**Tom Luedtke,**

*Assistant Administrator for Procurement.*

■ Accordingly, 48 CFR Part 1805 is amended as follows:

## PART 1805—PUBLICIZING CONTRACT ACTIONS

■ 1. The authority citation for 48 CFR Part 1805 continues to read as follows:

**Authority:** 42 U.S.C. 2473(c)(1).

### § 1805.303 [Amended]

■ 2. In paragraph (a)(i) of § 1805.303, revise the phrase ''of $25 million or greater.'' to read ''of $5 million or greater.''

[FR Doc. 05–19398 Filed 9–28–05; 8:45 am]

BILLING CODE 7510–01–P

# Proposed Rules

Federal Register
Vol. 70, No. 188
Thursday, September 29, 2005

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–22525; Directorate Identifier 2005–NM–149–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135BJ, –135ER, –135KE, –135KL, and –135LR Airplanes; and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for certain EMBRAER airplanes listed above. This proposed AD would require modifying the drain system of the auxiliary power unit (APU) by installing a scavenge pump and, for certain airplanes, replacing the APU exhaust assembly. This proposed AD results from a report of fuel leaking from the APU feeding line and accumulating inside the APU compartment because the drain system is inadequate when the APU is running. We are proposing this AD to prevent fuel accumulation and subsequent flammable fuel vapors in the APU cowling, which, combined with an ignition source, could result in a fire or explosion.

**DATES:** We must receive comments on this proposed AD by October 31, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

- DOT Docket Web site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, Room PL–401, Washington, DC 20590.
- Fax: (202) 493–2251.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil.

**FOR FURTHER INFORMATION CONTACT:** Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Include the docket number ''FAA–2005–22525; Directorate Identifier 2005–NM–149–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments received by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://dms.dot.gov.*

### Examining the Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

### Discussion

The Departmento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, notified us that an unsafe condition may exist on certain EMBRAER Model EMB–135BJ, –135ER, –135KE, –135KL, and –135LR airplanes; and certain Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes. Affected airplanes are equipped with Airborne Model C–14 auxiliary power units (APUs). The DAC advises that it has received a report of fuel leaking from the APU feeding line and accumulating inside the APU compartment because the drain system is inadequate when the APU is running. Fuel accumulation and subsequent flammable fuel vapors in the APU cowling, combined with an ignition source, if not corrected, could result in ignition of fuel vapors and fire or explosion

### Relevant Service Information

EMBRAER has issued Service Bulletins 145LEG–49–0006 (for Model EMB–135BJ airplanes) and 145–49–0029 (for all remaining affected airplanes), both dated April 20, 2005. The service bulletins describe procedures for modifying the APU compartment drain system by installing a scavenge pump, supports, tubes, and hoses; and reworking the APU installation by removing a combustor drain hose and installing an aluminum round bar to the drain collector. For APUs having certain cowlings, Service Bulletin 145–49–0029 recommends the concurrent accomplishment of the actions specified in EMBRAER Service Bulletin 145–49–0023. Service Bulletin 145–49–0023, Revision 01, dated April 25, 2005, describes procedures for replacing the APU exhaust assembly with a new APU exhaust assembly. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition. The DAC

mandated the service information and issued Brazilian airworthiness directive 2005–08–05, effective September 6, 2005, to ensure the continued airworthiness of these airplanes in Brazil.

**FAA's Determination and Requirements of the Proposed AD**

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above. We have examined the DAC's findings, evaluated all pertinent information, and determined that we need to issue an AD for airplanes of this type design that are certificated for operation in the United States.

Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed below.

**Difference Between Proposed AD and Brazilian Airworthiness Directive**

The Brazilian airworthiness directive applies to ''all EMB–145( ) and EMB–135( ) aircraft models in operation, equipped with Model T–62T–40C14 APU.'' This proposed AD would further limit the applicability to airplanes having serial numbers below 14500927. We have been informed that airplanes at and above that serial number will be modified in production. This difference has been coordinated with the DAC.

**Costs of Compliance**

This proposed AD would affect about 800 airplanes of U.S. registry. The proposed pump installation would take about 15 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would cost about $1,768 or $1,967 per airplane. Based on these figures, the estimated cost of the proposed AD for U.S. operators is $2,194,400–$2,353,600, or $2,743 or $2,942 per airplane.

The number of airplanes subject to the proposed APU exhaust assembly replacement is unknown. If accomplished, this action would take about 6–7 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would cost about $9,828 or $12,844 per airplane. Based on these figures, the estimated cost of the proposed AD for U.S. operators is $10,218–$13,299 per airplane.

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

**Empresa Brasileira de Aeronautica S.A. (EMBRAER):** Docket No. FAA–2005–22525; Directorate Identifier 2005–NM–159–AD.

**Comments Due Date**

(a) The FAA must receive comments on this AD action by October 31, 2005.

**Affected ADs**

(b) None.

**Applicability**

(c) This AD applies to EMBRAER Model EMB–135BJ, –135ER, –135KE, –135KL, and –135LR airplanes; and Model EMB–145, –145ER, –145MR, –145LR, –145XR, –145MP, and –145EP airplanes; certificated in any category; equipped with Model C–14 auxiliary power units (APUs); except those airplanes with serial numbers 14500927 and subsequent.

**Unsafe Condition**

(d) This AD results from a report of fuel leaking from the APU feeding line and accumulating inside the APU compartment because the drain system is inadequate when the APU is running. We are issuing this AD to prevent fuel accumulation and subsequent flammable fuel vapors in the APU cowling, which, combined with an ignition source, could result in a fire or explosion.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Installation of Scavenge Pump Drain**

(f) Within 5,000 flight hours after the effective date of this AD, modify the APU compartment drain system by installing a scavenge pump on it by doing all actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 145LEG–49–0006 (for Model EMB–135BJ airplanes) or 145–49–0029 (for all remaining airplanes), both dated April 20, 2005.

**Concurrent Requirements**

(g) For airplanes with an APU cowling part number (P/N) 145–52979–401 or 145–52979–403: Before or concurrently with the pump drain installation required by paragraph (f) of this AD, replace the APU exhaust assembly by doing all actions specified in the Accomplishment Instructions of EMBRAER Service Bulletin 145–49–0023, Revision 01, dated April 25, 2005. Replacement before the effective date of this AD in accordance with EMBRAER Service Bulletin 145–49–0023, dated November 23, 2004, is also acceptable for compliance with the requirements of this paragraph.

**Alternative Methods of Compliance (AMOCs)**

(h)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

**Related Information**

(i) Brazilian airworthiness directive 2005–08–05, effective September 6, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on September 16, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–19238 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–13–P**

## DEPARTMENT OF TRANSPORTATION

## Federal Aviation Administration

## 14 CFR Part 39

**[Docket No. FAA–2005–22526; Directorate Identifier 2005–NM–008–AD]**

**RIN 2120–AA64**

## Airworthiness Directives; Boeing Model 747–200F, 747–200C, 747–400, 747–400D, and 747–400F Series Airplanes

**AGENCY:** Federal Aviation Administration (FAA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to adopt a new airworthiness directive (AD) for all Boeing Model 747–200F, 747–200C, 747–400, 747–400D, and 747–400F series airplanes. This proposed AD would require repetitive inspections for cracking of certain fuselage internal structure, and repair if necessary. This proposed AD is prompted by fatigue tests and analysis that identified areas of the fuselage where fatigue cracks can occur. We are proposing this AD to prevent loss of the structural integrity of the fuselage, which could result in rapid depressurization of the airplane.

**DATES:** We must receive comments on this proposed AD by November 14, 2005.

**ADDRESSES:** Use one of the following addresses to submit comments on this proposed AD.

• DOT Docket Web Site: Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.

• Government-wide rulemaking Web Site: Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.

• Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., Nassif Building, room PL–401, Washington, DC 20590.

• By Fax: (202) 493–2251.

• Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207.

You can examine the contents of this AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street SW., room PL–401, on the plaza level of the Nassif Building, Washington, DC. This docket number is FAA–2005–22526; the directorate identifier for this docket is 2005–NM–008–AD.

**FOR FURTHER INFORMATION CONTACT:** Ivan Li, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6437; fax (425) 917–6590.

**SUPPLEMENTARY INFORMATION:**

### Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed under **ADDRESSES.** Include ''Docket No. FAA–2005–22526; Directorate Identifier 2005–NM–008–AD'' in the subject line of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments submitted by the closing date and may amend the proposed AD in light of those comments.

We will post all comments we receive, without change, to *http://dms.dot.gov*, including any personal information you provide. We will also post a report summarizing each substantive verbal contact with FAA personnel concerning this proposed AD. Using the search function of that Web site, anyone can find and read the comments in any of our dockets, including the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You can review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you can visit *http://dms.dot.gov*.

### Examining the Docket

You can examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Management Facility office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Management Facility office (telephone (800) 647–5227) is located on the plaza level of the Nassif Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the DMS receives them.

### Discussion

Boeing has completed extended pressure fatigue tests on a Boeing Model 747SR and a 747–400 fuselage test article. Boeing has also used updated analysis methods on the 747 fuselage structure. The tests and analysis have identified areas of the fuselage where fatigue cracks can occur. This condition, if not corrected, could result in loss of the structural integrity of the fuselage and consequent rapid depressurization of the airplane.

### Related AD

On May 14, 2002, we issued AD 2002–10–10, amendment 39–12756 (67 FR 36081, May 23, 2002). That AD applies to certain Boeing Model 747 airplanes. That AD requires repetitive inspections to detect cracks in various areas of the fuselage internal structure, and repair if necessary. This proposed AD would require similar inspections for Model 747 airplanes that are not identified in the applicability of AD 2002–10–10.

We also issued AD 2004–07–22, amendment 39–13566 (69 FR 18250, April 7, 2004), as corrected (69 FR 19618, April 13, 2005), and as further corrected (69 FR 24063, May 3, 2005). That AD applies to all Boeing Model 747 series airplanes and requires that the FAA-approved maintenance inspection program be revised to include inspections that will give no less than the required damage tolerance rating for each structural significant item, and repair of cracked structure.

### Relevant Service Information

We have reviewed Boeing Alert Service Bulletin 747–53A2500, dated December 21, 2004. Procedures for repetitive inspections for cracks are listed in the following table:

SERVICE BULLETIN PROCEDURES

| The service bulletin describes procedures for— | Of the— |
|---|---|
| Internal detailed inspections | Upper deck floor beams;<br>Section 42 frames;<br>Section 46 frames; and<br>Nose wheel well bulkheads, sidewall panels, and the STA 360 and 380 main deck floor beams. |
| Internal and external detailed inspections | Main entry doors and door cutouts; and<br>Fuselage skin at all four corners of the main electronics bay access door cutout. |

The compliance threshold is 22,000 or 25,000 total flight cycles (depending on the inspection area and airplane configuration), with a repetitive interval of 3,000 flight cycles. The service bulletin recommends repairing cracks by using the structural repair manual (SRM) or contacting Boeing. Accomplishing the actions specified in the service information is intended to adequately address the unsafe condition.

**FAA's Determination and Requirements of the Proposed AD**

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other airplanes of this same type design. Therefore, we are proposing this AD, which would require accomplishing the actions specified in the service information described previously, except as discussed below.

**Differences Between the Proposed AD and the Service Bulletin**

The service bulletin specifies compliance times relative to the date of issuance of the service bulletin; however, this proposed AD would require compliance before the specified compliance times relative to the effective date of this AD.

Also, the service bulletin specifies contacting the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require you to repair those conditions by using a method that we approve, or using data that meet the certification basis of the airplane and that have been approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization whom we have authorized to make those findings.

**Costs of Compliance**

There are about 706 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

(per inspection cycle)

| Action | Work hours | Average labor rate per hour | Parts | Cost per airplane | Number of U.S.-registered airplanes | Fleet cost |
|---|---|---|---|---|---|---|
| Inspections | 260 | $65 | None required | $16,900 | 107 | $1,808,300 |

**Authority for This Rulemaking**

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in subtitle VII, part A, subpart III, section 44701, ''General requirements.'' Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

**Regulatory Findings**

We have determined that this proposed AD would not have federalism implications under Executive Order 13132. This proposed AD would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify that the proposed regulation:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

**List of Subjects in 14 CFR Part 39**

Air transportation, Aircraft, Aviation safety, Safety.

**The Proposed Amendment**

Accordingly, under the authority delegated to me by the Administrator, the FAA proposes to amend 14 CFR part 39 as follows:

## PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40113, 44701.

**§ 39.13 [Amended]**

2. The FAA amends § 39.13 by adding the following new airworthiness directive (AD):

**Boeing:** Docket No. FAA–2005–22526; Directorate Identifier 2005–NM–008–AD.

**Comments Due Date**

(a) The Federal Aviation Administration (FAA) must receive comments on this AD action by November 14, 2005.

**Affected ADs**

(b) Inspections specified in this AD may be considered an alternative method of compliance (AMOC) for certain requirements of AD 2004–07–22, as specified in paragraph (i)(2) of this AD.

**Applicability**

(c) This AD applies to all Boeing Model 747–200F, 747–200C, 747–400, 747–400D, and 747–400F series airplanes; certificated in any category.

**Unsafe Condition**

(d) This AD was prompted by fatigue tests and analysis that identified areas of the fuselage where fatigue cracks can occur. We are issuing this AD to prevent loss of the structural integrity of the fuselage, which could result in rapid depressurization of the airplane.

**Compliance**

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

**Inspections**

(f) Except as required/provided by paragraphs (g) and (h) of this AD: Do initial and repetitive inspections for fuselage cracks using applicable internal and external detailed inspection methods, and repair all cracks, by doing all the actions specified in the Accomplishment Instructions of Boeing Alert Service Bulletin 747–53A2500, dated December 21, 2004. Do the initial and repetitive inspections at the times specified in paragraph 1.E. of the service bulletin. Repair any crack before further flight after detection.

**Exceptions to Service Bulletin Procedures**

(g) If any crack is found during any inspection required by this AD, and the bulletin specifies to contact Boeing for appropriate action: Before further flight, repair the crack according to a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or according to data meeting the certification basis of the airplane approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically reference this AD.

(h) Where the service bulletin specifies a compliance time after the issuance of the service bulletin, this AD requires compliance within the specified compliance time after the effective date of this AD.

**AMOCs**

(i)(1) The Manager, Seattle Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Accomplishment of the inspections specified in this AD is considered an AMOC for the applicable requirements of paragraphs (c) and (d) of AD 2004–07–22, amendment 39–13566, under the following conditions:

(i) The actions must be done within the compliance times specified in AD 2004–07–22. The initial inspection must be done at the times specified in paragraph (d) of AD 2004–07–22, and the inspections must be repeated within the intervals specified in paragraph (f) of this AD.

(ii) The AMOC applies only to the areas of Supplemental Structural Inspection Document D6–35022, Revision G, that are specified in Boeing Alert Service Bulletin 747–53A2500, dated December 21, 2004.

(3) An AMOC that provides an acceptable level of safety may be used for any repair required by this AD, if it is approved by an Authorized Representative for the Boeing Delegation Option Authorization Organization who has been authorized by the Manager, Seattle ACO, to make those findings. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(4) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Issued in Renton, Washington, on September 16, 2005.

**Ali Bahrami,**

*Manager, Transport Airplane Directorate, Aircraft Certification Service.*

[FR Doc. 05–19239 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–13–P**

## SECURITIES AND EXCHANGE COMMISSION

## 17 CFR Parts 210, 229, 240 and 249

**[Release Nos. 33–8617; 34–52491; File No. S7–08–05]**

**RIN 3235–AJ29**

## Revisions to Accelerated Filer Definition and Accelerated Deadlines for Filing Periodic Reports

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** We are proposing to modify the periodic report filing deadlines so that only the largest accelerated filers (those with a market value of outstanding voting and non-voting common equity held by non-affiliates of $700 million or more) become subject to the final phase-in of the accelerated filing transition schedule that will require annual reports on Form 10–K to be filed within 60 days after fiscal year end. Under our proposed amendments, however, these companies would continue to file their quarterly reports on Form 10–Q under the current 40-day deadline, rather than the 35-day deadline that was scheduled to apply to quarterly reports filed next year. Other accelerated filers would continue to file both their annual and quarterly reports under current deadlines—75 days after fiscal year end for annual reports on Form 10–K and 40 days after quarter end for quarterly reports on Form 10–Q. We also are proposing to revise the definition of the term ''accelerated filer'' to permit an accelerated filer that has voting and non-voting common equity held by non-affiliates of less than $25 million to exit accelerated filer status promptly and begin filing its annual and quarterly reports on a non-accelerated filer basis. Finally, the proposed amendments would permit a large accelerated filer that has voting and non-voting common equity held by non-affiliates of less than $75 million to promptly exit large accelerated filer status.

**DATES:** Comments should be received on or before October 31, 2005.

**ADDRESSES:** Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form *http://www.sec.gov/rules/proposed.shtml;* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–08–05 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–9303.

All submissions should refer to File Number S7–08–05. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments will also be available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You

should submit only information that you wish to make available publicly.

**FOR FURTHER INFORMATION CONTACT:** Katherine W. Hsu, Special Counsel, Office of Rulemaking, at (202) 551–3430, Division of Corporation Finance, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549–3628.

**SUPPLEMENTARY INFORMATION:** We are proposing amendments to Rules 3–01,[1] 3–09[2] and 3–12[3] of Regulation S–X,[4] Item 101[5] of Regulation S–K,[6] Forms 10–Q, 10–K and 20–F[7] under the Securities Exchange Act of 1934 (''Exchange Act'')[8] and Exchange Act Rules 12b–2,[9] 13a–10[10] and 15d–10.[11]

## I. Background

### *A. Initial Adoption of Accelerated Filing Requirements*

On September 5, 2002, we adopted new rules requiring larger public companies filing annual reports on Form 10–K and quarterly reports on Form 10–Q to file these reports on an accelerated basis.[12] We adopted the accelerated filing requirements as part of a series of steps to modernize and improve the usefulness of the periodic reporting system. The term ''accelerated filer,'' which is used to describe these issuers, is defined in Exchange Act Rule 12b-2 and applies to an issuer once it first meets all of the following conditions as of the end of its fiscal year:

- The issuer has an aggregate market value of voting and non-voting common equity held by non-affiliates of the issuer (referred to as ''public float'') of $75 million or more,[13] as of the last business day of the issuer's most recently completed second fiscal quarter;[14]
- The issuer has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act[15] for a period of at least 12 calendar months;
- The issuer previously has filed at least one annual report; and
- The issuer is not eligible to use Forms 10–KSB[16] and 10–QSB[17] for its annual and quarterly reports.

The definition of an accelerated filer also contains specific requirements concerning the entry into, and exit from, accelerated filer status. These requirements provide that the determination of whether a non-accelerated filer becomes an accelerated filer as of the end of its fiscal year governs the filing deadlines for the annual report on Form 10–K to be filed for that fiscal year, for the quarterly reports on Form 10–Q to be filed for the subsequent fiscal year and for all such annual and quarterly reports to be filed thereafter.[18] Currently, once a company becomes an accelerated filer, it remains an accelerated filer unless and until it subsequently becomes eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.[19]

We originally determined to phase-in the accelerated filing deadlines over a three-year period in an effort to balance the market's demand for more timely information with the time that issuers need to prepare accurate information without undue burden.[20] In the accelerated filer adopting release, we anticipated that a gradual transition period would allow issuers to adjust their reporting schedules and develop efficiencies to ensure that the quality and accuracy of their reported information would not be compromised.[21]

Year one of the phase-in period began for accelerated filers with fiscal years ending on or after December 15, 2002. During year one, the Form 10–K annual report deadline remained at 90 days after fiscal year end, and the Form 10–Q quarterly report deadline remained at 45 days after quarter end, but accelerated filers became subject to new disclosure requirements concerning Web site access to their Exchange Act reports.[22] In year two, the deadline for annual reports on Form 10–K filed for fiscal years ending on or after December 15, 2003 was accelerated to 75 days and the deadline for the three subsequently filed quarterly reports on Form 10–Q was accelerated to 40 days.

In year three, the Form 10–K annual report deadline was to become further accelerated to 60 days for reports filed for fiscal years ending on or after December 15, 2004, and the deadline for the three subsequently filed quarterly reports on Form 10–Q was to accelerate to 35 days. This would have completed the phase-in for all accelerated filers, with the 60-day and 35-day deadlines remaining in place for Form 10–K and Form 10–Q, respectively, for all subsequent periods.

### *B. One-Year Postponement of the Final Phase-In Period for the Accelerated Periodic Report Deadlines*

However, in year two of the phase-in period, several issuers and auditors expressed concern over their ability to perform the work necessary to file reports timely and, in particular, to comply with the Commission's new internal control over financial reporting requirements[23] mandated by Section 404 of the Sarbanes-Oxley Act of 2002 at the same time that periodic report deadlines were scheduled to be further accelerated.[24] The Commission acted in response to the concerns voiced by issuers and auditors by providing

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[1] 17 CFR 210.3–01.

[2] 17 CFR 210.3–09.

[3] 17 CFR 210.3–12.

[4] 17 CFR 210.1–01 *et seq.*

[5] 17 CFR 229.101.

[6] 17 CFR 229.10 *et seq.*

[7] 17 CFR 249.308a; 17 CFR 249.310; and 17 CFR 249.220f.

[8] 15 U.S.C. 78a *et seq.*

[9] 17 CFR 240.12b–2.

[10] 17 CFR 240.13a–10.

[11] 17 CFR 240.15d–10.

[12] See Release No. 33–8128 (Sept. 5, 2002) [67 FR 58480].

[13] The $75 million public float threshold in the accelerated filer definition, though not the date of determination, is the same as the public float eligibility requirement for registration of a primary offering for cash on Form S–3 or Form F–3.

[14] For purposes of the accelerated filer definition, the issuer must compute the aggregate market value of its outstanding voting and non-voting common equity by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity, as of the last business day of its most recently completed second fiscal quarter.

[15] 15 U.S.C. 78m(a) or 78o(d).

[16] 17 CFR 249.310b.

[17] 17 CFR 249.308b.

[18] While the accelerated filer definition does not by its terms exclude foreign private issuers, to date, the filing deadlines for accelerated filers have had application only with respect to foreign private issuers that file annual reports on Form 10–K and quarterly reports on Form 10–Q. In another action that the Commission takes today to defer the compliance date for our rules implementing application of Section 404 of the Sarbanes-Oxley Act of 2002 [15 U.S.C. 7262] for an additional year for certain issuers, until fiscal years commencing on or after July 15, 2007, the deferral would extend to foreign private issuers that are not accelerated filers.

[19] See Exchange Act Rule 12b–2. See also Item 10(a)(2) of Regulation S–B [17 CFR 228.10(a)(2)] for the conditions for entering and exiting the small business reporting system. A reporting company that is not a small business issuer must meet the definition of a small business issuer at the end of two consecutive fiscal years before it becomes eligible to file Forms 10–KSB and 10–QSB. The term ''small business issuer'' is defined in Rule 12b–2 as a U.S. or Canadian issuer that is not an investment company and that has less than $25 million in revenues and public float. If the issuer is a majority-owned subsidiary, it meets the definition of a small business issuer only if the parent corporation is also a small business issuer.

[20] See Release No. 33–8128.

[21] *Id.*

[22] *Id.* Accelerated filers are required to disclose in their annual reports where investors can obtain access to their filings, including whether the company provides access to its Form 10–K, 10–Q and 8–K reports on its Internet Web site, free of charge, as soon as reasonably practicable after those reports are electronically filed with, or furnished to, the Commission. See Item 101(e)(4) of Regulation S–K [17 CFR 229.101(e)(4)].

[23] See Exchange Act Rules 13a–15 and 15d–15 [17 CFR 240.13a–15 and 15d–15] and Item 308 of Regulations S–K and S–B [17 CFR 229.308 and 228.308], as adopted in Release No. 33–8238 (June 5, 2003) [68 FR 36636].

[24] See note 18 in Release No. 33–8477 (Aug. 25, 2004) [69 FR 53550].

additional time and opportunity for accelerated filers and their auditors to focus on complying with the new internal control reporting requirements. First, in February 2004, we extended the Section 404 rule compliance dates so that an accelerated filer had to begin complying with the internal control reporting requirements for its first fiscal year ending on or after November 15, 2004, rather than its first fiscal year ending on or after June 15, 2004.[25]

In November 2004, we postponed for one year the final phase-in period for acceleration of the annual and quarterly report filing deadlines on Forms 10–K and 10–Q. The amendments permitted an accelerated filer's annual report on Form 10–K for a fiscal year ending on or after December 15, 2004, but before December 15, 2005, to be filed within 75 days, rather than 60 days, after fiscal year end and the three subsequently filed quarterly reports on Form 10–Q to be filed within 40 days, rather than 35 days, after the end of a fiscal quarter. Under the amended accelerated phase-in schedule that currently governs the periodic report filing deadlines, annual reports on Form 10–K filed by accelerated filers for fiscal years ending on or after December 15, 2005 will be due within 60 days after fiscal year end and quarterly reports on Form 10–Q will be due within 35 days after fiscal quarter end, thereby completing the final phase-in period.

## II. Discussion of Proposed Amendments

Based on various comments from issuers and auditors, and a recent recommendation from the SEC Advisory Committee on Smaller Public Companies regarding the accelerated filing deadlines,[26] we are proposing to amend the definition of accelerated filer and to further amend the accelerated filing deadlines. We are proposing to amend the accelerated filer rules to:

- Create a new category of accelerated filer, the ''large accelerated filer,'' for issuers with an aggregate worldwide [27] market value of voting and non-voting common equity held by non-affiliates of the issuer of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; [28]
- Amend the accelerated filing deadlines so that the 60-day Form 10–K annual report deadline would apply only to the proposed new large accelerated filers. The Form 10–Q quarterly report filing deadline for large accelerated filers would remain at 40 days with no further reduction provided in our rules. Periodic report deadlines for other accelerated filers would remain at 75 days for annual reports on Form 10–K and 40 days for quarterly reports on Form 10–Q, again with no further reduction provided in our rules; [29]
- Allow an accelerated filer with less than a $25 million aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of the issuer, as of the last business day of the issuer's most recently completed second fiscal quarter, to exit accelerated filer status without a second year's determination or other delay; [30] and
- Allow a large accelerated filer with less than a $75 million aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of the issuer, as of the last business day of the issuer's most recently completed second fiscal quarter, to exit large accelerated filer status.[31]

We believe that the proposed deadlines would strike the appropriate balance between the timeliness and accessibility of Exchange Act reports to investors and to the financial markets and the need of companies and their auditors to conduct, without undue cost, high-quality and thorough assessments and audits of the financial statements contained in the reports.

The deadline for filing an annual report on Form 20–F has not been accelerated and we are not proposing to do so in this release. However, the current definition of accelerated filer and the proposed definitions of accelerated filer and large accelerated filer do not exclude companies that qualify as foreign private issuers. As a result, a foreign private issuer that voluntarily files on Forms 10–K and 10–Q is required to determine whether it is an accelerated filer or large accelerated filer and, if so, must comply with the applicable deadlines. A foreign private issuer that loses its status as such and is therefore required to file reports on Forms 10–K and 10–Q must do likewise.

### *A. Large Accelerated Filers*

We are proposing amendments to the Exchange Act Rule 12b–2 definition of ''accelerated filer'' to create a new category of accelerated filers to be designated as ''large accelerated filers.'' [32] Under the proposed amendments, an issuer would become a large accelerated filer once it meets the following conditions for the first time at its fiscal year end:

- The issuer had an aggregate worldwide market value of voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; [33]
- The issuer has been subject to the reporting requirements of Exchange Act Section 13(a) or 15(d) for a period of at least 12 calendar months;
- The issuer has filed at least one annual report pursuant to Section 13(a) or 15(d); and
- The issuer is not eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.

The proposed $700 million public float threshold in the large accelerated filer definition, though not the time of determination, is the same as the public float eligibility requirement that we used in our recently adopted Securities Offering Reform final rules [34] to establish a new category of issuer defined as a ''well-known seasoned issuer.'' [35]

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[25] Release No. 33–8392 (Feb. 24, 2004) [69 FR 9722].

[26] The Commission organized the Advisory Committee on March 23, 2005 to examine the impact of the Sarbanes-Oxley Act and other federal securities laws on smaller public companies.

[27] As discussed in Section II.D of this release, we are proposing to modify the existing Rule 12b–2 definition of ''accelerated filer'' to refer to the company's ''aggregate worldwide market value'' rather than ''aggregate market value.''

[28] See paragraph 2 of the proposed Exchange Act Rule 12b–2 definition of ''accelerated filer and large accelerated filer.''

[29] See proposed amendments to Exchange Act Forms 10–K [17 CFR 249.310] and 10–Q [17 CFR 249.308a].

[30] See paragraph 3(ii) of the proposed Exchange Act Rule 12b–2 definition of ''accelerated filer and large accelerated filer.''

[31] See paragraph 3(iii) of the proposed Exchange Act Rule 12b–2 definition of ''accelerated filer and large accelerated filer.''

[32] See paragraph 2 of the proposed Exchange Act Rule 12b–2 of ''accelerated filer and large accelerated filer.''

[33] As a related change, we propose to re-define an accelerated filer as an issuer with an aggregate market value of voting and non-voting common equity held by non-affiliates of $75 million or more and less than $700 million. See paragraph (1)(i) of the proposed Exchange Act Rule 12b-2 definition of ''accelerated filer and large accelerated filer.''

[34] Release No. 33–8591 (July 19, 2005) [70 FR 44722].

[35] In addition to having different dates of determination, the ''large accelerated filer'' and ''well-known seasoned issuer'' definitions are different in other respects. In particular, Securities Act Rule 405 [17 CFR 230.405] defines a well-known seasoned issuer as one that meets the following requirements:

- the registrant requirements of Form S–3 [17 CFR 239.13] or F–3 [17 CFR 239.33];
- the issuer either must have outstanding a worldwide market value of its outstanding voting and non-voting common equity held by non-affiliates of $700 million or more, or must have issued at least $1 billion aggregate principal amount of non-convertible securities, other than common equity, in registered offerings during the past three years and register only non-convertible securities; and

We believe that Exchange Act reporting companies with a public float of $700 million or more are more closely followed by the markets and securities analysts than other issuers. They accounted for approximately 95% of U.S. equity market capitalization in 2004.[36] By virtue of their size, the proposed large accelerated filers also are more likely than smaller companies to have a well-developed infrastructure and financial reporting resources to support further acceleration of the annual report deadline.[37] Under the proposed amendments, large accelerated filers would become subject to Form 10–K annual report deadlines that are more accelerated than the deadlines that would apply to all other filers, as explained in Section II.B. below.

Currently, every company filing annual reports on Form 10–K and quarterly reports on Form 10–Q is required to check a box on the cover page of these reports to indicate whether or not it is an accelerated filer. As a conforming amendment, we propose to add a new check box to the cover page of Forms 10–K, 10–Q and 20–F so that a reporting company can indicate on these forms whether it is a large accelerated filer, an accelerated filer, or a non-accelerated filer. We also are proposing a conforming amendment to Item 101(c) of Regulation S–K which requires accelerated filers to disclose in their annual reports where investors can obtain access to their filings, including whether the company provides access to its Forms 10–K, 10–Q and 8–K reports on its Internet Web site, free of charge. The proposed amendment to this item references both accelerated filers and large accelerated filers.

**Request for Comment**

- Is it appropriate to create a new category of accelerated filers known as ''large accelerated filers?'' Should we modify the proposed definition of ''large accelerated filer'' in any way?
- Are differences between the Securities Act Rule 405 definition of ''well-known seasoned issuer'' and the proposed Exchange Act Rule 12b–2 definition of ''large accelerated filer'' appropriate? Would any problems be created by differences between the two definitions?
- As proposed, an issuer would determine whether it must enter large accelerated filer status based on the aggregate worldwide market value of its outstanding voting and non-voting common equity as of the last business day of the issuer's most recently completed second fiscal quarter. Is it appropriate to tie the determination of large accelerated filer status and accelerated filer status to the last business day of the issuer's most recently completed second fiscal quarter? Should the determination be made over a longer period of time?

*B. Proposed Amendments to the Accelerated Filing Deadlines*

Under the current phase-in schedule and absent today's proposed amendments, all accelerated filers would become subject to the final phase-in period that requires annual reports on Form 10–K for fiscal years ending on or after December 15, 2005 to be filed within 60 days after fiscal year end and subsequently filed quarterly reports on Form 10–Q to be filed within 35 days after quarter end. After evaluating the discussions and comments provided at the Commission's roundtable on internal control over financial reporting,[38] and public comments on our initial accelerated filer release,[39] temporary postponement release[40] and securities offering reform release,[41] we are proposing to maintain the accelerated filing deadlines at the current 75 days for annual reports on Form 10–K for accelerated filers that are not large accelerated filers and to maintain the accelerated filer deadlines for all accelerated filers at the current 40 days for quarterly reports on Form 10–Q. While we are mindful of the incremental benefit that more timely accessibility to periodic reports would provide to investors, we believe that the burdens associated with an increased acceleration of the deadlines justify our proposal to subject only certain companies to the further acceleration. This proposal also is consistent with a recommendation adopted on August 10, 2005 by the SEC Advisory Committee on Smaller Public Companies that smaller public companies not be subject to any further acceleration of due dates for annual and quarterly reports.[42] If the

- the issuer cannot be a registered investment company, asset-backed issuer or a type of issuer that falls within the Rule 405 definition of an ''ineligible issuer.''

As a result, for example, some debt-only issuers may become well-known seasoned issuers while only issuers that have registered a class of equity security under Section 12 of the Exchange Act could become subject to the large accelerated filer definition. In addition, there could be some large accelerated filers that are ineligible issuers and therefore cannot become well-known seasoned issuers. For example, a large accelerated filer that is not current with respect to its periodic report filing obligations, or that was a blank check, shell company (other than a business combination related shell company) or an issuer of penny stock as defined in Exchange Act Rule 3a51–1 during the three years before the determination date specified in the ineligible issuer definition, would not be eligible to become a well-known seasoned issuer.

[36] See the discussion in Section II.A.1 in Release No. 33–8591. We previously used the $700 million cut-off as the threshold differentiating the largest companies with the most active market following in our order granting an exemption under Section 36 of the Exchange Act [15 U.S.C. 78mm(a)] to accelerated filers with less than $700 million from filing their management's annual report on internal control over financial reporting and the related attestation report of the registered public accounting firm and providing them an additional 45 days to timely file. Release No. 34–50754 (Nov. 30, 2004) [69 FR 70291].

[37] See, *e.g.,* letters from the American Institute of Certified Public Accountants, BDO Seidman LLP, Ernst & Young LLP, and KPMG LLP in response to Release No. 33–8501.

[38] See SEC Press Release Nos. 2005–20 (Feb. 22, 2005) and 2005–50 (Apr. 7, 2005). The roundtable was held April 13, 2005. See, *e.g.,* testimony from Bob Miles of Washington Mutual and letters from Ernst & Young LLP April 4, 2005, Glass Lewis & Co. April 12, 2005 and Crowe Chizek and Company LLC, March 28, 2005. Materials related to the roundtable, including an archived broadcast of the roundtable are available on-line at *http://www.sec.gov/spotlight/soxcomp.htm.*

[39] See, *e.g.,* letters from the American Institute of Certified Public Accountants, American Bankers Association, Arris Group, Inc., Baldwin & Lyons, Inc., Berry, Dunn, McNeil & Parker, R.G. Associates, Inc., Ernst & Young LLP, HealthSouth Corporation, Jones & Keller, P.C., KPMG LLP, Helen W. Melman, National Association of Real Estate Companies, New York State Bar Association, Perkins Coie LLP, Thacher Profitt & Wood, Triarc Companies, Inc., and Troutman Sanders LLP in response to Release No. 33–8089 (Apr. 12, 2002) [67 FR 19896].

[40] See, *e.g.,* letters from the American Institute of Certified Public Accountants, Becker & Poliakoff, P.A., BDO Seidman, LLP, The Chubb Corporation, Deloitte & Touche LLP, Ernst & Young LLP, First Federal Bancshares of Arkansas, Federal Signal Corporation, Franklin Financial Services Corporation, MBNA Corporation, Pfizer Inc., Protective Life Corporation, and Spectrum Organic Products in response to Release No. 33–8477 (Aug. 25, 2004) [69 FR 67392].

[41] See, *e.g.,* letters from the American Institute of Certified Public Accountants, BDO Seidman LLP, Ernst & Young LLP, and KPMG LLP in response to Release No. 33–8501.

[42] The Advisory Committee advocated that in implementing this recommendation, the Commission look to the Committee's guidance in defining ''smaller public company.'' Materials related to the August 10, 2005 meeting held by the Commission's Advisory Committee on Smaller Public Companies are available on-line at *http://www.sec.gov/info/smallbus/acspc.shtml.* The

Continued

proposed deadlines are adopted, we intend to begin applying the revised deadlines with respect to Form 10–K annual reports for fiscal years ending on or after December 15, 2005.

We continue to believe that the public float test is an appropriate measure of size and market interest, and that there is a significant difference between companies with a public float of $700 million or more and other public companies.[43] Based on the public comments that we have received and our staff's analysis of the available data in connection with the Securities Offering Reform, we believe other accelerated filers with a public float below $700 million generally are not followed as closely by investors and analysts and have fewer resources to devote to regulatory compliance and financial reporting. We note, however, that most accelerated filers have been able to meet the current accelerated deadlines, although we are aware of the additional cost that meeting these deadlines has imposed on companies. In order to provide reporting companies with a public float between $75 million and $700 million with adequate time to prepare accurate and complete reports without imposing undue burden and expense, we propose to maintain the Form 10–K annual report deadline at 75 days after fiscal year end and the Form 10–Q quarterly report deadline at 40 days after the quarter end for these companies.

The proposed amendments also would allow large accelerated filers to continue filing their quarterly reports on Form 10–Q within 40 days after quarter end. Based on comments that we have received indicating that most accelerated filers find it significantly more difficult to comply with the accelerated quarterly report deadline than with the accelerated annual report deadline,[44] we propose to maintain the Form 10–Q quarterly report deadline at 40 days even for large accelerated filers. We are also proposing technical corrections to the codification of financial reporting policies to reflect these amendments.

Therefore, the proposed periodic report filing deadlines would relate to the following three separate tiers of issuers and be of different lengths depending on the type of issuer:

- Large accelerated filers would be required to file their annual reports on Form 10–K within 60 days after the end of the fiscal year and quarterly reports on Form 10–Q within 40 days after the end of the fiscal quarter;
- Accelerated filers that are not large accelerated filers would be required to file their annual reports on Form 10–K within 75 days after the end of the fiscal year and quarterly reports on Form 10–Q within 40 days after the end of the fiscal quarter; and
- All issuers that are not accelerated filers would continue to be required to file their annual reports on Form 10–K within 90 days after the end of the fiscal year and quarterly reports on Form 10–Q within 45 days after the end of the fiscal quarter.

The following table compares the periodic reporting deadlines under the current rules with the deadlines under our proposed amendments:

| Category of filer | Deadlines for reports beginning with the annual report for fiscal year ending on or after December 15, 2005 under the current rules | | Category of filer | Deadlines for reports beginning with the annual report for fiscal year ending on or after December 15, 2005 under the proposed rules | |
|---|---|---|---|---|---|
| | 10–K Deadline (days) | 10–Q Deadline (days) | | 10–K Deadline (days) | 10–Q Deadline (days) |
| Accelerated Filer ($75MM or more). | 60 | 35 | Large Accelerated Filer ($700MM or more). | 60 | 40 |
| | | | Accelerated Filer (between $75MM and $700MM). | 75 | 40 |
| Non-accelerated Filer (less than $75MM). | 90 | 45 | Non-accelerated Filer (less than $75MM). | 90 | 45 |

**Request for Comment**

- Do the proposed three tiers of filing deadlines provide appropriate balance and structure within the periodic reporting system? Would an alternate structure for reporting deadlines be preferable? If so, what criteria should we use to determine the appropriate deadlines?
- Should we change any of the filing deadlines for any category of issuer?
- Would three tiers of filing deadlines cause confusion among investors regarding the due dates for companies' periodic reports? Is it necessary to distinguish large accelerated filers from smaller accelerated filers if the only effect of the distinction is to require large accelerated filers to file their annual reports 15 days earlier than smaller accelerated filers? If there should be a uniform set of deadlines that would apply to all accelerated filers, what should those deadlines be?
- Should we require large accelerated filers to file their quarterly reports within 35 days after quarter end, consistent with the deadline that is currently scheduled to be phased-in under existing requirements?
- Is it appropriate to maintain the current 75 and 40-day filing deadlines for accelerated filers that are not large accelerated filers? Do the current deadlines achieve our goal of providing detailed reports to the public as quickly as possible without compromising the reliability and accuracy of the reports?
- Would deadlines for accelerated filers and non-accelerated filers that are longer than the deadlines for large accelerated filers unduly disadvantage investors in companies that are not large accelerated filers?

*C. Exiting Accelerated Filer and Large Accelerated Filer Status*

We propose to amend the accelerated filer definition to allow an issuer to exit accelerated filer status at the end of the

Advisory Committee also recommended deferring compliance with the internal control over financial reporting requirements by companies that are not accelerated filers.

[43] According to the Office of Economic Analysis, in the period from 1997 to 2004, issuers with a market capitalization in excess of $700 million that conducted offerings typically had an average of 12 analysts following them prior to the offering and issuers with a market capitalization of between $75 million and $200 million, in most cases, have between zero to five analysts following them with approximately 50% having zero to two analysts following them. Further analysis showed that issuers with a market capitalization in excess of $700 million had significantly higher average daily trading volumes. In addition, the data shows that issuers with a market capitalization in excess of $700 million accounted for over 90% of the proceeds from securities offerings over that period.

[44] See, *e.g.,* letters from The Committee on Corporate Reporting of Financial Executives International (July 20, 2005) and Stewart Information Services Corp (June 23, 2005).

fiscal year if the issuer's aggregate market value of voting and non-voting common equity held by non-affiliates of the issuer falls below $25 million, as of the last day of the issuer's second fiscal quarter. Under the current definition, an issuer that has become an accelerated filer remains one unless and until the issuer becomes eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.

Under requirements set forth in Item 10(a)(2) of Regulation S–B, a reporting issuer that is not a small business issuer must meet the small business issuer definition at the end of two consecutive years before becoming eligible to use Forms 10–KSB and 10–QSB. The determination made by a reporting company at the end of the second consecutive fiscal year that it has become eligible to file on Forms 10–KSB and 10–QSB governs reports relating to the next fiscal year only. This requires a reporting issuer that first meets the small business issuer definition at the end of a fiscal year to wait two years from that point before it can begin to file its annual report on a non-accelerated filer basis.[45]

Thus, a previously reporting issuer will always enter the small business reporting system with a quarterly report filed on Form 10–QSB and must still file its annual report on Form 10–K for the fiscal year in which it first met the small business definition.[46] This differs from the accelerated filer reporting system which requires new accelerated filers to always enter the system with the filing of an annual report rather than a quarterly report.

In addition, there have been circumstances under the current accelerated filer definition where a company that no longer has common equity securities outstanding and therefore no longer has a duty to file periodic reports with respect to these securities, but continues to have a reporting obligation for another security, is required to remain an accelerated filer for two years. While the instances in which a company no longer would have publicly held common equity but still be subject to an Exchange Act reporting obligation with respect to another class of non-common equity security are likely to occur infrequently, the circumstance may occasionally occur in connection with a stock merger or leveraged buyout structured as a cash merger or recapitalization.[47] These companies remain subject to the requirement to file their periodic reports on an accelerated filer basis despite the fact that they would not have been required to initially become an accelerated filer if they had only a class of debt securities registered under the Exchange Act.

In the initial accelerated filer adopting release, we expressed the view that, once a company meets the accelerated filer threshold, it is reasonable to minimize a company's fluctuation in and out of accelerated filer status.[48] We are proposing to allow an accelerated filer to exit accelerated filer status promptly if the aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of the issuer has fallen to less than $25 million as of the last business day of the issuer's most recently completed second fiscal quarter.[49] While the proposed amendments would permit additional companies to exit accelerated filer status, our research indicates that the proposed amendments would not significantly increase fluctuations out of accelerated filer status.[50]

Considering the substantial loss in public float required for an accelerated filer to reach the $25 million threshold and the limited following and reporting resources of a public issuer with less than $25 million in public float, we believe that it is appropriate to allow these issuers to exit accelerated filer status promptly. The types of companies that would benefit from this proposed relief also would include those that no longer have any voting or non-voting common equity held by non-affiliates but continue to be subject to the reporting requirements of Exchange Act Section 13(a) or 15(d) with respect to a class of securities that are not common equity securities.[51]

Under the proposed amendments, the issuer's determination that it has less than $25 million in public float, as of the last business day of the issuer's most recently completed second fiscal quarter would permit it to file its annual report on a non-accelerated filer basis for the fiscal year in which that determination is made. For example, if a December 31, 2005 fiscal year-end accelerated filer had less than $25 million in public float on June 30, 2005, the end of its second fiscal quarter, it could exit accelerated filer status on December 31, 2005, and would not have to file its Form 10–K for fiscal year 2005 on an accelerated filer basis. The issuer could then continue to file all subsequent annual and quarterly reports on a non-accelerated filer basis unless and until the issuer again meets the accelerated filer definition.

The proposed amendments also permit large accelerated filers to exit from large accelerated filer status. Once its public float has fallen to less than $75 million, also as of the last business day of the company's most recently completed second fiscal quarter, a large accelerated filer could exit large accelerated filer status as of the end of the fiscal year and file its annual report as an accelerated filer or non-accelerated filer in the same year that the determination of public float was made. If the company's public float was $25 million or more, but less than $700 million, as of the last day of its second fiscal quarter, the company would begin filing its reports as an accelerated filer. If the company's public float was less than $25 million as of that date, it no longer would be required to file its periodic reports on an accelerated basis.[52] We have chosen the $75 million threshold for the exit of a large accelerated filer, as it parallels the amount of public float that characterizes an accelerated filer.

**Request for Comment**

- Should we revise the accelerated filer definition to allow issuers that fall

[45] For example, if an issuer meets the definition of accelerated filer at the end of its 2004 fiscal year, the issuer will file its 2004 annual report on an accelerated filer basis. However, in order to exit accelerated filer status, an accelerated filer must meet the definition of small business issuer and file on an accelerated filer basis at the end of its 2004 and 2005 fiscal years before being allowed to file on a non-accelerated filer basis beginning with its first quarter Form 10–QSB in fiscal 2006.

[46] See Item 10(a)(2)(v) of Regulation S–B [17 CFR 228.10(a)(2)(v)].

[47] Based on data from the Center for Research in Securities Prices Database obtained by the Office of Economic Analysis, we estimate that 142 companies met the accelerated filer definition on or after their fiscal years ended December 15, 2002 and then subsequently delisted their common stock or other common equity from a national securities exchange or Nasdaq during the 2003 calendar year. Of the 142 companies, we estimate that only four companies continued to have an Exchange Act reporting obligation with respect to another class of debt or non-common equity securities. It is our understanding that the data in CRSP does not include a complete list of common equity traded through the OTC Bulletin Board or Pink Sheets LLC, so our estimate may understate the actual number of companies that would be affected by our proposed revision to the accelerated filer definition.

[48] See Release No. 33–8128. Stability of status helps avoid investor confusion and assures that issuers have sufficient notice to prepare their periodic disclosure on a timely basis.

[49] See paragraph 3(ii) of the proposed Exchange Act Rule 12b–2 definition of ''accelerated filer and large accelerated filer.''

[50] Based on data from the Thomson Worldscope Global Database, we estimate that only 25 companies had a public float of $75 million in 2003, but less than $25 million in 2004.

[51] The proposed amendment would allow reporting issuers that have lost their public float to be treated similarly to other Exchange Act reporting issuers that have never had a public float, such as issuer of publicly held debt securities.

[52] See paragraph (3)(iii) of the proposed Exchange Act Rule 12b–2 definition of ''accelerated filer and large accelerated filer.''

below the $25 million public float threshold to exit accelerated filer status, as proposed? Would the proposal adversely impact investor protection in any material respect?

• Is $25 million public float an appropriate threshold point at which an accelerated filer should be permitted to exit accelerated filer status? For example, should an accelerated filer instead be permitted to exit when its public float drops below $50 million? If not, what would be a more appropriate point and why?

• Is $75 million public float an appropriate threshold point at which a large accelerated filer should be permitted to exit large accelerated filer status? Should a large accelerated filer instead be allowed to exit when its public float has dropped to $250 million, $500 million, or some other threshold?

• As proposed, an issuer would determine whether it can exit accelerated filer status at the end of the fiscal year and for its upcoming annual report based on the aggregate worldwide market value of the issuer's outstanding voting and non-voting common equity as of the last business day of the issuer's most recently completed second fiscal quarter. Is this an appropriate date upon which to determine whether an issuer should be able to exit accelerated filer status? Should the determination instead be tied to the end of the fiscal year? Is tying the determination to a specific date appropriate, or should the determination be made over a longer period of time based on an average aggregate worldwide market value? How could we improve the timing and method of determination?

• Is it appropriate to allow such an issuer to exit accelerated filer status only at the end of a fiscal year, or should the issuer be able to begin filing on a non-accelerated filer basis with respect to quarterly reports when the issuer is no longer subject to Exchange Act reporting with respect to its common equity securities during one of its first three quarters? Would the proposal, if adopted, adversely impact investor protection in any material respect?

• Should we, as proposed, allow an issuer to exit accelerated filer status if it has no voting or non-voting common equity held by non-affiliates and no duty to file reports pursuant to Section 13(a) or 15(d) of the Exchange Act with respect to any common equity securities, but still has a duty to file such reports with respect to its debt securities?

• Should an issuer be required to file a notice with the Commission, such as on Form 8–K, announcing that there has been a change in its periodic report filing deadline status (*i.e.*, the issuer has moved from one tier in the proposed three-tier accelerated filing system to a different tier)? If so, when should that issuer be required to file the notice?

*D. Other Amendments*

We also are proposing other amendments to our rules. First, we are proposing to make the same types of conforming changes to Rules 3–01, 3–09 and 3–12 of Regulation S–X that we made when we first adopted the accelerated filing deadlines in 2002.[53] In the interest of creating uniform requirements, our conforming amendments would require financial information that must be included in Commission filings other than periodic reports filed on Forms 10–K and 10–Q, such as Securities Act and Exchange Act registration statements and proxy or information statements, to be at least as current as the financial information included in these periodic reports.[54] Second, we are proposing to make similar changes to the transition reports that a company must make when it changes its fiscal year.[55]

Finally, we are proposing to revise the public float condition in the existing Exchange Act Rule 12b–2 definition of ''accelerated filer'' to indicate that it would have a public float of $75 million or more but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter, and to clarify that the public float term in this definition means the ''aggregate *worldwide* market value of the company's voting and non-voting common equity held by non-affiliates.'' [56] This is also clarified in the note to the proposed definition of ''accelerated filer and large accelerated filer'' that discusses how to calculate public float. The addition of the word, ''worldwide,'' would codify staff interpretation of the term [57] and is consistent with the public float condition in the recently adopted Securities Act Rule 405 definition of a ''well-known seasoned issuer.'' The determination of public float would be premised on the existence of a public trading market for the company's equity securities.[58]

**Request for Comment**

• Should we make the proposed conforming revisions to Regulation S–X and the transition reports required by Rules 13a–10 and 15d–10?

• Is there any reason why we should not amend the aggregate market value condition in the accelerated filer definition, as proposed, to refer to a company's aggregate worldwide market value?

## III. General Request for Comments

We request and encourage any interested person to submit comments on the proposal and any other matters that might have an impact on the proposal. We request comment from investors, as well as issuers and other users of Exchange Act information that may be affected by the proposal. With respect to any comments, we note that such comments are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments.

## IV. Paperwork Reduction Act

The proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995, or PRA.[59] Form 10–K (OMB Control No. 3235–0063) and Form 10–Q (OMB Control No. 3235–0070) were adopted pursuant to Sections 13 and 15(d) of the Exchange Act. They prescribe information that a registrant must disclose annually and quarterly to the market about its business. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The proposed amendments to the Exchange Act Rule 12b–2 definition of ''accelerated filer'' and to the periodic reporting deadlines applicable to accelerated filers, if adopted, would:

• Amend the Exchange Act Rule 12b–2 definition of an ''accelerated filer'' to create a new category of accelerated filer, the ''large accelerated filer,'' for issuers with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (''public float'') of $700 million or more;

[53] See Release No. 33–8128.

[54] 17 CFR 210.3–01, 210.3–09 and 210.3–12.

[55] See the proposed amendments to paragraph (j)(1) of Exchange Act Rules 13a–10 and 15d–10.

[56] See the proposed amendment to paragraph (1)(i) of Exchange Act Rule 12b–2.

[57] This interpretation is consistent with the longstanding staff interpretation of the public float determination for Form S–3 and Form F–3 eligibility requirements.

[58] This is consistent with the requirement in General Instruction I.B.1 of Form S–3 and Form F–3 that a registrant have a $75 million market value. Therefore, an entity with $75 million of common equity securities outstanding but not trading in any public trading market would not be an accelerated filer or a large accelerated filer.

[59] 44 U.S.C. 3501 *et seq.*

• Re-define an ''accelerated filer'' as an issuer with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of $75 million or more, but less than $700 million;

• Amend the accelerated filing deadlines so that the 60-day Form 10–K annual report deadline would apply only to the proposed large accelerated filers. The Form 10–Q quarterly report deadline for large accelerated filers would remain at 40 days. Periodic report deadlines for accelerated filers would remain at 75 days for annual reports on Form 10–K and 40 days for quarterly reports on Form 10–Q;

• Amend the accelerated filer definition to allow accelerated filers with less than $25 million in public float to exit accelerated filer status without a two-year delay; and

• Amend the accelerated filer definition to allow large accelerated filers with less than $75 million in public float to exit large accelerated filer status.

Our proposed amendments would not change the amount of information required to be included in Exchange Act reports. Therefore, they would neither increase nor decrease the amount of burden hours necessary to prepare Forms 10–K and 10–Q, for the purposes of the PRA. This analysis is consistent with the PRA analysis included in the original accelerated filing proposing and adopting releases.[60] We reached the same conclusion in our proposing and adopting releases postponing the final phase-in period for acceleration of periodic filing.[61] In that release, we stated that the amendments changing the due dates for a temporary period did not increase the information collection burden in a quantifiable manner, and commenters did not address this position.

## V. Cost-Benefit Analysis

The proposed amendments are part of our continuing initiative to improve the regulatory system for periodic disclosure under the Exchange Act. We first adopted rules regarding accelerated filing deadlines in September 2002, requiring issuers with a public float of $75 million or more and meeting three other conditions specified in Exchange Act Rule 12b–2 [62] to accelerate the filing of Exchange Act periodic reports on Form 10–K and Form 10–Q. We are sensitive to the costs and benefits that result from our rulemaking. Based on concerns expressed by the public, we propose to:

• Create a new category of accelerated filer—the ''large accelerated filer''—that would be defined in the same manner as accelerated filers and include issuers with $700 million or more in public float;

• Change the accelerated filing deadlines currently scheduled to be phased-in; and

• Amend the provisions governing issuers' ability to exit accelerated filer status.

In this section, we examine the costs and benefits of our proposal. These costs and benefits are difficult to quantify. We request comment on the type, amount and duration of any costs or benefits from the proposed revisions to the accelerated filer definition. We request commenters to provide their views along with supporting data as to the benefits and costs associated with the proposals.

### *A. Benefits*

Our proposed amendments may afford various benefits. Our proposed amendments contemplate a three-tier system governing accelerated filing deadlines that would continue to exclude smaller companies that may have fewer financial resources or less well-developed financial reporting systems in place to support the Form 10–K and 10–Q accelerated filing deadlines. Our proposals also would allow accelerated filers that are not large accelerated filers to continue filing both their annual reports on Form 10–K and quarterly reports on Form 10–Q under the currently scheduled 75-day and 40-day deadlines without further modification. These accelerated filers would not be subject to the final phase-in of deadlines that would result in a further acceleration of deadlines. Under the proposals, even the larger companies, defined as ''large accelerated filers,'' which would include companies with a public float of $700 million or more, would be able to continue to file their quarterly reports on Form 10–Q within 40 days after fiscal quarter end. They are the only companies that would be required to file their annual reports within 60 days after fiscal year end, beginning with reports filed for fiscal years ending on or after December 15, 2005.

In the initial adopting release for the accelerated filing deadlines, we acknowledged several possible costs and risks to affected reporting companies.[63] Since the adoption of the deadlines, we have received several comments expressing concern over the ability of companies to meet the accelerated filing deadlines, in light of the new requirements adopted in 2003 by the Commission requiring companies to include a report by management and accompanying auditor's report on the effectiveness of the company's internal control over financial reporting in their annual reports. Our proposals maintain the current periodic report filing deadlines for accelerated filers and the current quarterly report filing deadlines for both accelerated filers and large accelerated filers. We are proposing to provide these companies with additional time to prepare their annual and quarterly reports and to update their financial statements included in a registration statement, proxy or information statement. It is difficult to quantify the benefits that the extra time would afford these companies, however, as noted in the cost-benefit analysis included in our initial accelerated filing release,[64] additional time to prepare the financial reports may lower preparation costs and limit the internal resources that must be committed to filing periodic reports. Companies may therefore direct those resources towards other projects. Also, companies may take into account this possible lower cost of entry when considering whether to become a public reporting company.

The longer deadlines would also allow additional time for companies' management, external auditors, boards of directors and audit committees to review the disclosure included in the periodic reports. Thus, as an indirect benefit for the markets and investors, the proposed amendments may lead to higher quality and more accurate reports. As another indirect benefit, as companies are provided with more time to file their periodic reports, it may be less likely that companies become subject to the collateral consequences of the late filing of reports (*e.g.*, losing the ability to use short-form registration).

We propose to continue to subject large accelerated filers to the final phase-in of the deadlines for annual reports on Form 10–K. We continue to

[60] See Release No. 33–8089 and Release No. 33–8128. In the initial accelerated filing proposing release, we acknowledged the possibility that accelerating the filing deadline could result in respondents investing more resources in technology, relying more on outside advisers, higher average charges by outside advisers or increased efficiencies in preparing periodic reports.

[61] See Release No. 33–8507 and Release No. 33–8477.

[62] Also, as of the end of the fiscal year, the issuer must have been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; must have filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and must not eligible be to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.

[63] See Release No. 33–8128.

[64] See Release 33–8089.

believe, at this stage, that larger issuers possess the infrastructure and resources to support further acceleration of filing deadlines for annual reports, and that they have a greater market following than smaller companies. We also continue to believe that our accelerated filing deadlines promote investor protection by providing investors with timely access to important information. In creating the proposed category of large accelerated filers, which would continue to file annual reports under accelerated deadlines, we have proposed a system that accelerates the delivery of material information to investors and capital markets for those issuers that we believe are not only more capable of meeting the deadlines, but also for which we believe the benefits to investors justify the possible increased costs.

The proposed conforming amendments that relate to the timeliness requirements for the inclusion of financial information in Securities Act and Exchange Act registration statements, proxy or information statements, and transition reports, promote consistency among our rules. These proposed amendments also may promote capital formation, by providing companies with a longer window before financial statements in registration statements become stale.

Our proposals covering the exit from accelerated filer status offer similar benefits. While we continue to believe that it is important to minimize fluctuation in and out of accelerated filer status, we have identified some situations with respect to which we believe the current rules have been unnecessarily restrictive. One such situation involves a company that has de-registered all of its common equity but still has an Exchange Act reporting obligation with respect to another class of securities. Under the current requirements, this company must still file reports on an accelerated basis, despite the fact that it would not have been required to become an accelerated filer initially if it only had a class of debt securities registered under the Exchange Act. We believe that our proposed amendment permitting filers to exit based on a public float measurement would be a more balanced and fair approach than the current rules that govern the exit from accelerated filer status.

*B. Costs*

We believe, and academic studies indicate, that the information required to be contained in the Exchange Act periodic reports is valuable to investors and the markets.[65] For quarterly reports on Form 10–Q filed by both large accelerated filers and accelerated filers and for annual reports on Form 10–K filed by accelerated filers with less than $700 million in public float, the proposed amendments have the incremental effect of delaying access to periodic report information to investors and to the capital markets. Information required by Exchange Act reports provides a verification function against other unofficial statements made by issuers. Investors can judge these informal statements against the more extensive formal disclosure provided in the reports, including financial statements prepared in accordance with generally accepted accounting principles. Accelerated filing shortens the delay before this verification can occur and speeds the timing for comparative financial analyses of information in those reports. Delaying access to this information may thereby hinder an investor's ability to make informed decisions on as timely a basis as would have been possible if the final phase-in of accelerated filing deadlines were completed. Thus, the amendments which propose longer deadlines of periodic reports than those currently scheduled, will delay investors in making informed investment and valuation decisions, and may increase capital market inefficiencies in stock valuation and pricing. Likewise, the delay may cause Exchange Act reports to have less relevance to investors.

Moreover, smaller companies generally are followed by fewer analysts and have less institutional ownership. One study shows that smaller companies experience a larger price impact on the filing date than larger companies, indicating that filings contain more valuable information for smaller companies than larger companies.[66] The delay of filing deadlines for smaller companies may be costly to the market, perhaps even more costly to the market than the delay of filing deadlines for larger companies. Nevertheless, we recognize inherent difficulties in the ability to quantify the effect that, for example, the proposed 15-day delay in the filing of the annual report by accelerated filers would have on the market.

The Office of Economic Analysis has provided us with data for companies listed on NYSE, Amex, NASDAQ, the Over the Counter Bulletin Board (OTCBB) and Pink Sheets LLC from which we can estimate the number of companies that would be affected by these proposals. For the most part, the data is based on a public float definition which is highly correlated to the Commission's definition of public float.[67] The data indicates that 2,307 of the companies that are listed on NYSE, Amex, NASDAQ, OTCBB or the Pink Sheets have a public float of between $75 million and $700 million, while 1,678 of the companies have a public float over $700 million. The companies possessing between $75 million and $700 million in public float represent 23% of the total number of companies on the exchanges and 4.3% of the total public float of these companies on the exchanges. The companies with a public float of over $700 million represent approximately 18% of the total number of companies on these exchanges and approximately 95% of the total public float on these exchanges.[68]

The proposed amendments may produce costs as a result of requiring companies and their investors to regularly monitor public float levels to determine companies' filing deadlines. It is difficult to quantify the number of companies that would be affected by our proposed amendments relating to the exit of issuers from accelerated filer status or large accelerated filer status, however, we have reason to believe that this number is small. Using 2003 data, we estimate that the amendment which relates to the exit of issuers from accelerated filing status, if adopted, would allow four respondents to no longer be subject to the accelerated filer definition and to be able to file their

[65] For example, see Qi, Wu and Haw, ''The Incremental Information Content of SEC 10–K Reports Filed under the EDGAR System,'' in the Journal of Accounting, Auditing and Finance.

[66] See Griffin, ''Got Information? Investor Response to Form 10–K and Form 10–Q EDGAR Filings,'' in the Review of Accounting Studies.

[67] Bloomberg was the source of the public float data. Bloomberg defines public float as the number of shares outstanding less shares held by insiders and those deemed to be ''stagnant shareholders.'' ''Stagnant shareholders'' include ESOP's, ESOT's, QUEST's employee benefit trusts, corporations not actively engaged in managing money, venture capital companies, and shares held by governments. When terms for public float were missing from Bloomberg, market capitalization was used as a proxy for public float which likely overstates the number of firms in certain categories. However, given the low number of companies where market capitalization was used, the difference should not be large.

[68] In our Securities Offering Reform release, we noted that in 2004, the issuers that met the thresholds for well-known seasoned issuers represented accounted for about 95% of U.S. equity market capitalization. See Release No. 33–8591. The eligibility requirements for a well-known seasoned issuer and the $700 million threshold for a large accelerated filer are not the same because, unlike an accelerated filer, a well-known seasoned issuer may also be an issuer of non-convertible securities, other than common equity. Nevertheless, we believe that the numbers in the release for well-known seasoned issuers still provide us with a good approximation for our purposes.

Exchange Act reports up to 15 days later than currently required.[69] In addition, our research indicates that only 25 companies with $75 million or more in public float in 2003 had their public float drop to less than $25 million in 2004.[70]

## VI. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,'' [71] we solicit data to determine whether the proposed amendments constitute ''major'' rules. Under SBREFA, a rule is considered ''major'' where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendments on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 23(a)(2) of the Exchange Act [72] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, Section 2(b) of the Securities Act [73] and Section 3(f) of the Exchange Act [74] require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation.

The proposed amendments balance the timeliness and accessibility of Exchange Act reports to investors and the financial markets against the need of companies and their auditors to conduct, without undue cost, high-quality and thorough assessments and audits of the companies' financial information, so as to increase the likelihood that more complete, reliable, and timely information contained in Exchange Act reports is available to the market. The creation of the category of large accelerated filers and the requirement that large accelerated filers file their annual reports within 60 days after fiscal year end are proposed to preserve the timeliness and accessibility of issuer information so that investors can more easily make informed investment and voting decisions. We believe it is appropriate to fully implement the 60-day accelerated deadline for annual reports for large accelerated filers, given their internal reporting resources and the greater market interest that they generate. Similarly, we are seeking to retain the 40-day deadline for the quarterly reports on Form 10–Q for large accelerated filers and the 75 and 40-day deadlines for the annual and quarterly reports of accelerated filers that are not large accelerated filers. We have proposed that issuers with a public float that has dropped below $25 million be allowed to exit accelerated filer status, without the current two-year delay.

Informed investor decisions generally promote market efficiency and capital formation. The proposals would affect accelerated filers differently depending on their public float. Some accelerated filers would be required to further accelerate their filing deadlines, while others would remain subject to current filing deadlines. A few would be able to exit accelerated filer status more quickly. This may enhance competition by avoiding the imposition of onerous burdens on smaller competitors who are least able to bear them. This may also have the effect of allowing some competitors to file their Exchange Act reports later than others, potentially providing some competitive advantage to the later filers. We have also heard concerns from some issuers that accelerated filing deadlines may affect their ability to provide accurate and reliable information. We have sought to minimize these concerns by limiting further acceleration of annual reports to only the largest public issuers that are likely to have the greatest internal reporting resources. In contrast, allowing issuers to retain their current filing deadlines or to exit accelerated filer status would have the effect of delaying the receipt of information by investors, and the delay may affect an investor's ability to make informed decisions in as timely a fashion. These amendments may further promote capital formation by diminishing the risk that companies would not be able to utilize short-form registration because of the untimely filing of reports.

Our conforming amendments to Regulation S–X which cover the timeliness of financial information in registration statements and proxy or information statements may affect capital formation. This may promote capital formation by providing companies with a longer window to access capital markets before financial information becomes stale.

The possibility of these effects and their magnitude if they were to occur are difficult to quantify. We request comment on whether the proposal, if adopted, would promote efficiency, competition and capital formation or have an impact or burden on competition. Commenters are requested to provide empirical data and other factual support for their views if possible.

## VII. Initial Regulatory Flexibility Analysis

This Initial Regulatory Flexibility Analysis, or IRFA, has been prepared in accordance with the Regulatory Flexibility Act.[75] This IRFA involves proposed amendments to the rules and forms under the Securities Act and the Exchange Act to:

- Create a new category of accelerated filer—the ''large accelerated filer''—for issuers with a public float of $700 million or more;
- Re-define an ''accelerated filer'' as an issuer with an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates of $75 million or more, but less than $700 million;
- Amend the accelerated filing deadlines so that the 60-day Form 10–K annual report deadline would apply only to the proposed large accelerated filers. The Form 10–Q quarterly report deadline for large accelerated filers would remain at 40 days. Periodic report deadlines for other accelerated filers would remain at 75 days for annual reports on Form 10–K and 40

[69] OEA provided us with a list of companies that delisted their common stock or other common equity from a national securities exchange or NASDAQ during the 2003 calendar year from the CRSP Database. From this list, we identified the companies that met the accelerated filer definition for fiscal years ending on or after December 15, 2002. Then, we confirmed whether or not the accelerated filer continued to have an Exchange Act reporting obligation with respect to a class of debt or equity securities on the Commission's Electronic Data Gathering, Analysis, and Retrieval System (''EDGAR''). It is our understanding that the data in CRSP does not include a complete list of common equity traded on the OTC Bulletin Board, so our estimate may understate the actual number of companies that would be affected by our proposed revision to the accelerated filer definition.

[70] In deriving these estimates, we used common equity data as an approximation for public float data from the Thomson Worldscope Global Database.

[71] Pub. L. No. 104–121, Title II, 110 Stat. 857 (1996).

[72] 15 U.S.C. 78w(a)(2).

[73] 15 U.S.C. 77b(b).

[74] 15 U.S.C. 78c(f).

[75] 5 U.S.C. 603.

days for quarterly reports on Form 10–Q;

- Amend the accelerated filer definition to allow accelerated filers with less than $25 million in public float to exit accelerated filer status without the current two-year delay; and
- Amend the accelerated filer definition to allow large accelerated filers with less than $75 million in public float to exit large accelerated filer status.

**A. Reasons for, and Objectives of, Proposed Amendments**

The proposed amendments seek to balance the interests of investors and the market to have timely access to important information contained in periodic reports against the need of companies and their auditors to conduct, without undue cost, high-quality and thorough assessments and audits of the companies financial information, so as to increase the likelihood that more complete, reliable, and timely information contained in Exchange Act reports is available to the market. The proposed amendments relate to the acceleration of filing deadlines for annual reports on Form 10–K and quarterly report on Form 10–Q for accelerated filers. We propose to change the current rules and forms to:

- Create a new category of accelerated filer—the ''large accelerated filer''—that would be defined in the same manner as an accelerated filer and include issuers with $700 million or more of public float;
- Amend the periodic report deadlines so that only the large accelerated filer become subject to the final phase-in of the accelerated Form 10–K deadlines; and
- Amend the definition of accelerated filer to facilitate the speedier exit by accelerated filers from accelerated filer status.

While we continue to believe that periodic reports contain information that is essential to conduct comparative financial analysis, and that timely access to these reports can greatly benefit investors and the market, we share in the concern expressed by several companies regarding the currently imposed deadlines. These comments have led to our proposals today which would subject only large accelerated filers to the shortest annual report accelerated filing deadlines, which we believe is achievable by issuers without undue cost. In doing so, we acknowledge the relative ability of different issuers to support the accelerated report deadlines. In proposing new rules governing the exit from accelerated filer status, we seek to eliminate unnecessary restrictions and delays, and attempt to achieve a more streamlined set of rules.

*B. Legal Basis*

We are proposing the amendments to the forms and rules under the authority set forth in Sections 3(b) and 19(a) of the Securities Act and Sections 12, 13, 15(d) and 23(a) of the Exchange Act.

*C. Small Entities Subject to the Proposed Amendments*

For purposes of the Regulatory Flexibility Act, Exchange Act Rule 0–10(a) [76] defines an issuer, other than an investment company, to be a ''small business'' or ''small organization'' if it had total assets of $5 million or less on the last day of its most recent fiscal year.

The proposed amendments would affect only the Exchange Act reporting companies that would be defined as ''accelerated filers'' or ''large accelerated filers.'' Under the current rules, an issuer becomes an accelerated filer once it first meets the following conditions as of the end of its fiscal year:

- The issuer has an aggregate market value of voting and non-voting common equity held by non-affiliates of the issuer (referred to as ''public float'') of $75 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter; [77]
- The issuer has been subject to the reporting requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least 12 calendar months;
- The issuer previously has filed at least one annual report; and
- The issuer is not eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.

An issuer becomes a large accelerated filer in much the same way, except that a large accelerated filer has an aggregate market value of voting and non-voting common equity held by non-affiliates of the issuer (referred to as ''public float'') of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter.

According to the Standard & Poors Research Insight Compustat Database, as of a recent date, of the 990 reporting companies listed with assets of $5 million or less, 28, or 2.8%, had a market capitalization greater than $75 million and three had a market capitalization greater than $700 million.[78] Based on our research, we do not expect these proposals to affect a substantial number of small entities.

*D. Reporting, Recordkeeping, and Other Compliance Requirements*

Changes to Form 10–K annual report and Form 10–Q quarterly report filing deadlines should not affect smaller entities. Our proposals would subject large accelerated filers with $700 million or more in public float to the currently scheduled final phase-in of the accelerated Form 10–K annual report deadline of 60 days, but they would continue to file their quarterly reports on Form 10–Q under the current 40-day deadline. Accelerated filers that are not large accelerated filers or those with at least $75 million in public float, but less than $700 million, as of the last day of the second fiscal quarter, would continue filing their annual reports and quarterly reports on Forms 10–K and 10–Q under the current 75-day and 40-day deadlines, respectively.[79]

Our other proposed amendments governing the exit from accelerated filer status could have an impact on a company that becomes a small entity after its public float threshold has dropped below $25 million. However, we do not expect the impact of the proposed amendments on small entities to be significant, because we expect that only a few accelerated filers would become small entities each year.[80] For those that do, the proposed amendments would streamline their exit from accelerated filer status, and make it easier for such issuers to begin filing their reports under longer deadlines. Specifically, under the proposed amendments, issuers no longer would have to wait for two years before they could start filing under longer deadlines. We seek comment on whether any of our proposals affect the reporting burden of smaller entities.

[76] 17 CFR 240.0–10(a).

[77] For purposes of the accelerated filer definition, the issuer must compute the aggregate market value of its outstanding voting and non-voting common equity by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity, as of the last business day of its most recently completed second fiscal quarter.

[78] It is our understanding that the data in the Compustat Database is derived principally from larger issuers, so our estimate could understate the actual number of issuers that would be affected by the proposals. This sample was taken in September 2005. Assuming that this sample is representative of small entities, the accelerated filer public float requirement has the effect of excluding almost all small entities from the definition.

[79] We also noted that the accelerated filer deadlines have little, if any, effect on smaller entities. See Release No. 33–8129.

[80] Based on data from the Thomson Worldscope Global Database, we estimate that only 25 companies had a public float of $75 million in 2003, but less than $25 million in 2004.

*E. Duplicative, Overlapping or Conflicting Federal Rules*

We believe that there are no rules that duplicate, overlap or conflict with the proposed amendments.

*F. Significant Alternatives*

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with our proposals, we considered the following alternatives:

1. Establishing different compliance or reporting requirements for smaller entities that take into account the resources available to smaller entities;

2. Setting different thresholds upon which companies can exit from accelerated filer status; and

3. Using different standards by which companies are measured to determine whether they should be subject to different regulatory burdens, taking into account the needs of smaller entities.

We have considered different changes to our rules and forms to achieve our regulatory objectives, and where possible, have taken steps to minimize the effect of the rules on smaller entities. Our proposed amendments likely would have a favorable impact on smaller entities as they now permit more companies to exit from accelerated status and permit companies to exit from accelerated status without the current two-year delay. Therefore, as a result of our amendments, it is less likely that smaller entities would be subject to accelerated deadlines of their periodic reports.

*G. General Request for Comments*

We solicit written comments regarding this analysis. We request comment on whether the proposals could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

**VIII. Update to Codification of Financial Reporting Policies**

The Commission proposes to amend the ''Codification of Financial Reporting Policies'' announced in Financial Reporting Release No. 1 (April 15, 1982) as follows:

1. By amending Section 102.05.(2) to read as follows:

*(2) Conforming the Filing Requirements of Transition Reports to the Current Requirements for Forms 10–Q and 10–K*

To conform to the current filing periods for reports on Forms 10–K and 10–Q, the filing period for transition reports on Form 10–K is 60 days for large accelerated filers, 75 days for accelerated filers, and 90 days for other issuers after the close of the transition period or the date of the determination to change the fiscal year, whichever is later, and for transition reports on Form 10–Q, the filing period is 40 days for large accelerated filers and accelerated filers or 45 days for other issuers after the later of these two events.

2. By amending Section 102.05. to revise the preliminary note to the ''Appendix'' to Section 102.05. to read as follows:

*Preliminary Note:* The following examples are applicable if the issuer is neither a large accelerated filer nor an accelerated filer. If the issuer is a large accelerated filer, substitute 60 days for 90 days in the examples for transition reports on Form 10–K, and substitute 40 days for 45 days in the examples for transition reports on Form 10–Q. If the issuer is an accelerated filer, substitute 75 days for 90 days in the examples for transition reports on Form 10–K, and subsitute 40 days for 45 days in the examples for transition reports on Form 10–Q.

3. By amending Section 302.01.a. to:

a. Replace the phrase ''after 45 days but within 90, 75 or 60 days of the end of the registrant's fiscal year for accelerated filers, as applicable depending on the registrant's fiscal year (or after 45 days but within 90 days of the end of the registrant's fiscal year for other registrants)'' with the phrase ''after 45 days but within 60 days of the end of the registrant's fiscal year for large accelerated filers or after 45 days but within 75 days of the end of the registrant's fiscal year for accelerated filers (or after 45 days but within 90 days of the end of the registrant's fiscal year for other registrants)'' in the second paragraph of Section 302.01.a.; and

b. Replace the phrase ''after 45 days but within 90, 75 or 60 days of the end of its fiscal year if the registrant is an accelerated filer, as applicable depending on the registrant's fiscal year (*i.e.*, February 16 to March 31, 15, or 1 for calendar year companies) (or after 45 days but within 90 days of the end of its fiscal year for other registrants (*i.e.*, February 16 to March 31 for calendar year companies))'' with the phrase ''after 45 days but within 60 days of the end of its fiscal year if the registrant is a large accelerated filer (*i.e.*, February 16 to March 1 for calendar year companies), after 45 days but within 75 days of the end of its fiscal year if the registrant is an accelerated filer (*i.e.*, February 16 to March 15 for calendar year companies), or after 45 days but within 90 days of the end of its fiscal year for other registrants (*i.e.*, February 16 to March 31 for calendar year companies)'' in the first sentence of the fourth paragraph of Section 302.01.a.

4. By amending Section 302.01.b. to:

a. Replace the phrase ''134, 129 or 124 days subsequent to the end of a registrant's fiscal year if the registrant is an accelerated filer, as applicable depending on the registrant's fiscal year (or 134 days subsequent to the end of a registrant's fiscal year for other registrants)'' with the phrase ''129 days subsequent to the end of a registrant's fiscal year if the registrant is a large accelerated filer or an accelerated filer (or 134 days subsequent to the end of a registrant's fiscal year for other registrants)'' in the first sentence of Section 302.01.b.; and

b. Replace the phrase ''135, 130 or 125 days of the date of the filing if the registrant is an accelerated filer, as applicable depending on the registrant's fiscal year (or 135 days of the date of the filing for other registrants)'' with the phrase ''130 days of the date of the filing if the registrant is a large accelerated filer or an accelerated filer (or 135 days of the date of the filing for other registrants)'' in the second sentence of Section 302.01.b.

5. By amending Section 302.01.c. to:

a. Replace the phrase ''135, 130 or 125 days or more, if the registrant is an accelerated filer, as applicable depending on the registrant's fiscal year (or 135 days or more for other registrants)'' with the phrase ''130 days or more, if the registrant is a large accelerated filer or an accelerated filer (or 135 days or more for other registrants)'' in the first paragraph of Section 302.01.c.;

b. Replace the phrase ''as of an interim date within 135, 130 or 125 days, if the registrant is an accelerated filer, as applicable depending on the registrant's fiscal year (or 135 days for other registrants)'' with the phrase ''as of an interim date within 125 days, if the registrant is a large accelerated filer, or 130 days, if the registrant is an accelerated filer (or 135 days for other registrants)'' in the first paragraph of Section 302.01.c.; and

c. Replace the phrase ''after 45 days but within 90, 75 or 60 days of the end of the fiscal year if the registrant is an accelerated filer, as applicable depending on the registrant's fiscal year

(or after 45 days but within 90 days of the end of the fiscal year for other registrants)'' with the phrase ''after 45 days but within 60 days of the end of the fiscal year if the registrant is a large accelerated filer, after 45 days but within 75 days if the registrant is an accelerated filer (or after 45 days but within 90 days of the end of the fiscal year for other registrants)'' in the second and third sentences of the second paragraph of Section 302.01.c.

**Note:** The Codification is a separate publication of the Commission. It will not appear in the Code of Federal Regulations.

### IX. Statutory Authority and Text of Proposed Amendments

The amendments contained in this document are being proposed under the authority set forth in Sections 3(b) and 19(a) of the Securities Act and Sections 12, 13, 15(d) and 23(a) of the Exchange Act.

### Text of Proposed Amendments

### List of Subjects in 17 CFR Parts 210, 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

## PART 210—FORM AND CONTENT OF AND REQUIREMENTS FOR FINANCIAL STATEMENTS, SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934, PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, INVESTMENT COMPANY ACT OF 1940, INVESTMENT ADVISERS ACT OF 1940, AND ENERGY POLICY AND CONSERVATION ACT OF 1975

1. The authority citation for Part 210 continues to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 78c, 78j–1, 78*l*, 78m, 78n, 78o(d), 78q, 78u–5, 78w(a), 78*ll*, 78mm, 79e(b), 79j(a), 79n, 79t(a), 80a–8, 80a–20, 80a–29, 80a–30, 80a–31, 80a–37(a), 80b–3, 80b–11, 7202 and 7262, unless otherwise noted.

2. Section 210.3–01 is amended by revising paragraphs (e) and (i) to read as follows:

#### § 210.3–01 Consolidated balance sheets.

* * * * *

(e) For filings made after the number of days specified in paragraph (i)(2) of this section, the filing shall also include a balance sheet as of an interim date within the following number of days of the date of filing:

(1) 130 days for large accelerated filers and accelerated filers (as defined in § 240.12b–2 of this chapter); and

(2) 135 days for all other registrants.

* * * * *

(i)(1) For purposes of paragraphs (c) and (d) of this section, the number of days shall be:

(i) 60 days for large accelerated filers (as defined in § 240.12b–2 of this chapter);

(ii) 75 days for accelerated filers (as defined in § 240.12b–2 of this chapter); and

(iii) 90 days for all other registrants.

(2) For purposes of paragraph (e) of this section, the number of days shall be:

(i) 129 days subsequent to the end of the registrant's most recent fiscal year for large accelerated filers and accelerated filers (as defined in § 240.12b–2 of this chapter); and

(ii) 134 days subsequent to the end of the registrant's most recent fiscal year for all other registrants.

3. Section 210.3–09 is amended by revising paragraphs (b)(3) and (b)(4) to read as follows:

#### § 210.3–09 Separate financial statements of subsidiaries not consolidated and 50 percent or less owned persons.

* * * * *

(b) * * *

(3) The term *registrant's number of filing days* means:

(i) 60 days if the registrant is a large accelerated filer;

(ii) 75 days if the registrant is an accelerated filer; and

(iii) 90 days for all other registrants.

(4) The term *subsidiary's number of filing days* means:

(i) 60 days if the 50 percent or less owned person is a large accelerated filer;

(ii) 75 days if the 50 percent or less owned person is an accelerated filer; and

(iii) 90 days for all other 50 percent or less owned persons.

* * * * *

4. Section 210.3–12 is amended by revising paragraph (g) to read as follows:

#### § 210.3–12 Age of financial statements at effective date of registration statement or at mailing date of proxy statement.

* * * * *

(g)(1) For purposes of paragraph (a) of this section, the number of days shall be:

(i) 130 days for large accelerated filers and accelerated filers (as defined in § 240.12b–2 of this chapter); and

(ii) 135 days for all other registrants.

(2) For purposes of paragraph (b) of this section, the number of days shall be:

(i) 60 days for large accelerated filers (as defined in § 240.12b–2 of this chapter);

(ii) 75 days for accelerated filers (as defined in § 240.12b–2 of this chapter); and

(iii) 90 days for all other registrants.

## PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975-REGULATION S–K

5. The authority citation for Part 229 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 79e, 79j, 79n, 79t, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

6. Section 229.101 is amended by revising paragraph (e) to read as follows:

#### § 229.101 (Item 101) Description of business.

* * * * *

(e) *Available information.* Disclose the information in paragraphs (e)(1), (e)(2) and (e)(3) of this section in any registration statement you file under the Securities Act (15 U.S.C. 77a *et seq.*), and disclose the information in paragraphs (e)(3) and (e)(4) of this section if you are filing an annual report on Form 10–K (§ 249.310 of this chapter) and are an accelerated filer or a large accelerated filer (as defined in § 240.12b–2 of this chapter):

(1) Whether you file reports with the Securities and Exchange Commission. If you are a reporting company, identify the reports and other information you file with the SEC.

(2) That the public may read and copy any materials you file with the SEC at the SEC's Public Reference Room at 100 F Street, NE., Washington, DC 20549. State that the public may obtain information on the operation of the Public Reference Room by calling the SEC at 1–800–SEC–0330. If you are an electronic filer, state that the SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers that file electronically with the SEC and state the address of that site (*http://www.sec.gov*).

(3) You are encouraged to give your Internet address, if available, except that if you are filing your annual report on Form 10–K and are an accelerated filer

or a large accelerated filer, you must disclose your Internet address, if you have one.

(4)(i) Whether you make available free of charge on or through your Internet Web site, if you have one, your annual report on Form 10–K, quarterly reports on Form 10–Q (§ 249.308a of this chapter), current reports on Form 8–K (§ 249.308 of this chapter), and amendments to those reports filed or furnished pursuant to section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m(a) or 78o(d)) as soon as reasonably practicable after you electronically file such material with, or furnish it to, the SEC;

(ii) If you do not make your filings available in this manner, the reasons you do not do so (including, where applicable, that you do not have an Internet Web site); and

(iii) If you do not make your filings available in this manner, whether you voluntarily will provide electronic or paper copies of your filings free of charge upon request.

* * * * *

## PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for Part 240 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

8. Section 240.12b–2 is amended by revising the definition of ''Accelerated filer'' to read as follows:

### § 240.12b–2 Definitions.

* * * * *

*Accelerated filer and large accelerated filer.* (1) *Accelerated filer.* The term *accelerated filer* means an issuer after it first meets the following conditions as of the end of its fiscal year:

(i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $75 million or more, but less than $700 million, as of the last business day of the issuer's most recently completed second fiscal quarter;

(ii) The issuer has been subject to the requirements of section 13(a) or 15(d) of the Act (15 U.S.C. 78m or 78o(d)) for a period of at least twelve calendar months;

(iii) The issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Act; and

(iv) The issuer is not eligible to use Forms 10–KSB and 10–QSB (§ 249.310b and § 249.308b of this chapter) for its annual and quarterly reports.

(2) *Large accelerated filer.* The term *large accelerated filer* means an issuer after it first meets the following conditions as of the end of its fiscal year:

(i) The issuer had an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as of the last business day of the issuer's most recently completed second fiscal quarter;

(ii) The issuer has been subject to the requirements of section 13(a) or 15(d) of the Act for a period of at least twelve calendar months;

(iii) The issuer has filed at least one annual report pursuant to section 13(a) or 15(d) of the Act; and

(iv) The issuer is not eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.

(3) *Entering and exiting accelerated filer and large accelerated filer status.* (i) The determination at the end of the issuer's fiscal year for whether a non-accelerated filer becomes an accelerated filer, or whether a non-accelerated filer or accelerated filer becomes a large accelerated filer, governs the annual report to be filed for that fiscal year, the quarterly and annual reports to be filed for the subsequent fiscal year and all annual and quarterly reports to be filed thereafter while the issuer remains an accelerated filer or large accelerated filer.

(ii) Once an issuer becomes an accelerated filer, it will remain an accelerated filer unless the issuer determines at the end of a fiscal year that the aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of the issuer was less than $25 million, as of the last business day of the issuer's most recently completed second fiscal quarter. An issuer making this determination becomes a non-accelerated filer. The issuer will not become an accelerated filer again unless it subsequently meets the conditions in paragraph (1) of this definition.

(iii) Once an issuer becomes a large accelerated filer, it will remain a large accelerated filer unless the issuer determines at the end of a fiscal year that the aggregate worldwide market value of the voting and non-voting common equity held by non-affiliates of the issuer was less than $75 million, as of the last business day of the issuer's most recently completed second fiscal quarter. If the issuer's aggregate worldwide market value was $25 million or more, but less than $75 million, as of the determination date, the issuer becomes an accelerated filer. If the issuer's aggregate worldwide market value was less than $25 million as of the determination date, the issuer becomes a non-accelerated filer. An issuer will not become a large accelerated filer again unless it subsequently meets the conditions in paragraph (2) of this definition.

(iv) The determination at the end of the issuer's fiscal year for whether an accelerated filer becomes a non-accelerated filer, or a large accelerated filer becomes an accelerated filer or a non-accelerated filer, governs the annual report to be filed for that fiscal year, the quarterly and annual reports to be filed for the subsequent fiscal year and all annual and quarterly reports to be filed thereafter while the issuer remains an accelerated filer or non-accelerated filer.

**Note to paragraphs (1), (2) and (3):** The aggregate worldwide market value of the issuer's outstanding voting and non-voting common equity shall be computed by use of the price at which the common equity was last sold, or the average of the bid and asked prices of such common equity, in the principal market for such common equity.

* * * * *

9. Section 240.13a–10 is amended by revising paragraph (j) to read as follows:

### § 240.13a–10 Transition reports.

* * * * *

(j)(1) For transition reports to be filed on the form appropriate for annual reports of the issuer, the number of days shall be:

(i) 60 days for large accelerated filers (as defined in § 240.12b–2);

(ii) 75 days for accelerated filers (as defined in § 240.12b–2); and

(iii) 90 days for all other issuers; and

(2) For transition reports to be filed on Form 10–Q or Form 10–QSB (§ 249.308a or § 249.308b of this chapter), the number of days shall be:

(i) 40 days for large accelerated filers and accelerated filers (as defined in § 240.12b–2); and

(ii) 45 days for all other issuers.

* * * * *

10. Section 240.15d–10 is amended by revising paragraph (j) to read as follows:

### § 240.15d–10 Transition reports.

* * * * *

(j)(1) For transition reports to be filed on the form appropriate for annual reports of the issuer, the number of days shall be:

(i) 60 days for large accelerated filers (as defined in § 240.12b–2);

(ii) 75 days for accelerated filers (as defined in § 240.12b–2); and

(iii) 90 days for all other issuers; and

(2) For transition reports to be filed on Form 10–Q or Form 10–QSB (§ 249.308a or § 249.308b of this chapter), the number of days shall be:

(i) 40 days for large accelerated filers and accelerated filers (as defined in § 240.12b–2); and

(ii) 45 days for all other issuers.

* * * * *

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

11. The authority citation for Part 249 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

12. Section 249.308a is amended by revising paragraph (a) to read as follows:

**§ 249.308a Form 10–Q, for quarterly and transition reports under sections 13 or 15(d) of the Securities Exchange Act of 1934.**

(a) Form 10–Q shall be used for quarterly reports under section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), required to be filed pursuant to § 240.13a–13 or § 240.15d–13 of this chapter. A quarterly report on this form pursuant to § 240.13a–13 or § 240.15d–13 of this chapter shall be filed within the following period after the end of the first three fiscal quarters of each fiscal year, but no quarterly report need be filed for the fourth quarter of any fiscal year:

(1) 40 days after the end of the fiscal quarter for large accelerated filers and accelerated filers (as defined in § 240.12b–2 of this chapter); and

(2) 45 days after the end of the fiscal quarter for all other registrants.

* * * * *

13. Form 10–Q (referenced in § 249.308a) is amended by:

a. Revising General Instruction A.1.; and

b. Revising the check box on the cover page that starts ''Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b–2 of the Exchange Act.) * * *.''

The revisions read as follows:

**Note:** The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10–Q

General Instructions

A. Rule as to Use of Form 10–Q.

1. Form 10–Q shall be used for quarterly reports under Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)), filed pursuant to Rule 13a–13 (17 CFR 240.13a–13) or Rule 15d–13 (17 CFR 240.15d–13). A quarterly report on this form pursuant to Rule 13a–13 or Rule 15d–13 shall be filed within the following period after the end of each of the first three fiscal quarters of each fiscal year, but no report need be filed for the fourth quarter of any fiscal year:

a. 40 days after the end of the fiscal quarter for large accelerated filers and accelerated filers (as defined in 17 CFR 240.12b–2); and

b. 45 days after the end of the fiscal quarter for all other registrants.

* * * * *

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

Form 10–Q

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of ''accelerated filer and large accelerated filer'' in Rule 12b–2 of the Exchange Act. (Check one):

Large accelerated filer . . . . Accelerated filer . . . . Non-accelerated filer . . . .

* * * * *

14. Section 249.310 is revised to read as follows:

**§ 249.310 Form 10–K, for annual and transition reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934.**

(a) This form shall be used for annual reports pursuant to sections 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) for which no other form is prescribed. This form also shall be used for transition reports filed pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

(b) Annual reports on this form shall be filed within the following period:

(1) 60 days after the end of the fiscal year covered by the report for large accelerated filers (as defined in § 240.12b–2 of this chapter);

(2) 75 days after the end of the fiscal year covered by the report for accelerated filers (as defined in § 240.12b–2 of this chapter); and

(3) 90 days after the end of the fiscal year covered by the report for all other registrants.

(c) Transition reports on this form shall be filed in accordance with the requirements set forth in § 240.13a–10 or § 240.15d–10 of this chapter applicable when the registrant changes its fiscal year end.

(d) Notwithstanding paragraphs (b) and (c) of this section, all schedules required by Article 12 of Regulation S–X (§§ 210.12–01–210.12–29 of this chapter) may, at the option of the registrant, be filed as an amendment to the report not later than 30 days after the applicable due date of the report.

15. Form 10–K (referenced in § 249.310) is amended by:

a. Revising General Instruction A.;

b. Revising the check box on the cover page that starts ''Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b–2 of the Act). * * *;'' and

c. Revising Item 1B. of Part I.

The revisions read as follows:

**Note:** The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

Form 10–K

* * * * *

General Instructions

A. Rule as to Use of Form 10–K.

(1) This Form shall be used for annual reports pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78o(d)) (the ''Act'') for which no other form is prescribed. This Form also shall be used for transition reports filed pursuant to Section 13 or 15(d) of the Act.

(2) Annual reports on this Form shall be filed within the following period:

(a) 60 days after the end of the fiscal year covered by the report for large accelerated filers (as defined in 17 CFR 240.12b–2):

(b) 75 days after the end of the fiscal year covered by the report for accelerated filers (as defined in 17 CFR 240.12b–2); and

(c) 90 days after the end of the fiscal year covered by the report for all other registrants.

(3) Transition reports on this Form shall be filed in accordance with the requirements set forth in Rule 13a–10 (17 CFR 240.13a–10) or Rule 15d–10 (17 CFR 240.15d–10) applicable when the registrant changes its fiscal year end.

(4) Notwithstanding paragraphs (2) and (3) of this General Instruction A., all schedules required by Article 12 of Regulation S–X (17 CFR 210.12–01 '' 210.12–29) may, at the option of the

registrant, be filed as an amendment to the report not later than 30 days after the applicable due date of the report.

* * * * *

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

Form 10–K

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of ''accelerated filer and large accelerated filer'' in Rule 12b–2 of the Exchange Act. (Check one):

Large accelerated filer . . . .

Accelerated filer . . . .

Non-accelerated filer . . . .

* * * * *

Part I

* * * * *

Item 1. * * *

Item 1B. Unresolved Staff Comments.

If the registrant is an accelerated filer or a large accelerated filer, as defined in Rule 12b–2 of the Exchange Act (§ 240.12b–2 of this chapter), or is a well-known seasoned issuer as defined in Rule 405 of the Securities Act (§ 230.405 of this chapter) and has received written comments from the Commission staff regarding its periodic or current reports under the Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may provide other information including the position of the registrant with respect to any such comment.

* * * * *

16. Form 20–F (referenced in § 249.220f) is amended by:

a. Adding a check box to the cover page before the paragraph that starts ''Indicate by check mark which financial statement item the registrant has elected to follow * * *'' and

b. Revising Item 4A. to Part I.

The addition and revision read as follows:

**Note:** The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, DC 20549

Form 20–F

* * * * *

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of ''accelerated filer and large accelerated filer'' in Rule 12b–2 of the Exchange Act. (Check one):

Large accelerated filer . . . .

Accelerated filer . . . .

Non-accelerated filer . . . .

* * * * *

Part 1

* * * * *

Item 4. * * *

Item 4A. Unresolved Staff Comments

If the registrant is an accelerated filer or a large accelerated filer, as defined in Rule 12b–2 of the Exchange Act (§ 240.12b–2 of this chapter), or is a well-known seasoned issuer as defined in Rule 405 of the Securities Act (§ 230.405 of this chapter) and has received written comments from the Commission staff regarding its periodic reports under the Exchange Act not less than 180 days before the end of its fiscal year to which the annual report relates, and such comments remain unresolved, disclose the substance of any such unresolved comments that the registrant believes are material. Such disclosure may provide other information including the position of the registrant with respect to any such comment.

* * * * *

Dated: September 22, 2005.

By the Commission.

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 05–19427 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

**[REG–105346–03]**

**RIN 1545–BB92**

## Partnership Equity for Services; Hearing Cancellation

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Cancellation of notice of public hearing on proposed rulemaking.

**SUMMARY:** This document cancels a public hearing on proposed regulations relating to the tax treatment of certain transfers of partnership equity in connection with the performance of services.

**DATES:** The public hearing originally scheduled for October 5, 2005, at 10 a.m., is cancelled.

**FOR FURTHER INFORMATION CONTACT:** Robin R. Jones of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration) at (202) 622–7109 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:** A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on May 24, 2005 (70 FR 29675) announced that a public hearing was scheduled for October 5, 2005, at 10 a.m., in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue, NW., Washington, DC. The subject of the public hearing is under section 83 of the Internal Revenue Code. The public comment period for these regulations expired on September 14, 2005.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of Thursday, September 22, 2005, no one has requested to speak. Therefore, the public hearing scheduled for October 5, 2005, is cancelled.

**Cynthia E. Grigsby,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. 05–19389 Filed 9–28–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 601

**[REG–133578–05]**

**RIN 1545–BE74**

## Dividends Paid Deduction for Stock Held in Employee Stock Ownership Plan; Hearing

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of public hearing on proposed rulemaking.

**SUMMARY:** This document contains a notice of public hearing on proposed regulations relating to employee stock ownership plans.

**DATES:** The public hearing is being held on January 18, 2006, at 10 a.m. The IRS must receive outlines of the topics to be discussed at the hearing by November 23, 2005.

**ADDRESSES:** The public hearing is being held at 10 a.m. in the IRS Auditorium, Internal Revenue Service Building, 1111

Constitution Avenue, NW., Washington, DC. Send submissions to: CC:PA:LPD:PR (REG–133578–05), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, and Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–133578–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit electronic outlines of oral comments directly to the IRS Internet site at *http://www.irs.gov/regs.*

**FOR FURTHER INFORMATION:** Concerning the regulations, John T. Ricotta (202) 622–6060; concerning submissions, Robin Jones (202) 622–7109 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:** The subject of the public hearing is the notice of proposed rulemaking (REG–133578–05) that was published in the **Federal Register** on August 25, 2005 (70 FR 49897).

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing that submitted written or electronic comments, must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (signed original and eight (8) copies).

A period of 10 minutes is allotted to each person for presenting oral comments.

After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing.

Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

**Cynthia E. Grigsby,**

*Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).*

[FR Doc. 05–19390 Filed 9–28–05; 8:45 am]

**BILLING CODE 4830–01–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

### 33 CFR Part 117

**[CGD01–05–074]**

**RIN 1625–AA09**

## Drawbridge Operation Regulations; Saugus River, MA

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to temporarily change the drawbridge operating regulations governing the operation of the General Edwards SR1A Bridge, at mile 1.7, across the Saugus River between Lynn and Revere, Massachusetts. This change to the drawbridge operation regulations would allow the bridge to remain in the closed position from November 1, 2005 through April 30, 2006. This action is necessary to facilitate structural maintenance at the bridge.

**DATES:** Comments must reach the Coast Guard on or before October 14, 2005.

**ADDRESSES:** You may mail comments to Commander (obr), First Coast Guard District Bridge Branch, 408 Atlantic Avenue, Boston, Massachusetts, 02110, or deliver them to the same address between 7 a.m. and 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (617) 223–8364. The First Coast Guard District, Bridge Branch, maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the First Coast Guard District, Bridge Branch, 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Mr. John McDonald, Project Officer, First Coast Guard District, (617) 223–8364.

**SUPPLEMENTARY INFORMATION:**

### Regulatory Information

The Coast Guard is requesting that interested parties provide comments within shortened comment period of 15 days instead of standard 30 days for this notice of proposed rulemaking. In addition, the Coast Guard plans on making this rule effective less than 30 days after publication in the **Federal Register**.

The Coast Guard believes a shortened comment period is necessary and reasonable because the bridge rehabilitation construction scheduled to begin on November 1, 2005, is necessary, vital, work that must be performed as soon as possible in order to assure continuous safe and reliable operation of the SR1A Bridge.

Any delay in making this final rule effective by allowing comments for more than 15 days would not be in the best interest of public safety and the marine interests that use the Saugus River because delaying the effective date of this rulemaking would also require the rehabilitation construction work to continue beyond the proposed April 30, 2005, end date. This would result in the bridge closure continuing into May when recreational vessel traffic increases.

There were 7 bridge openings in November 2004, and no openings December through March. The few bridge openings that were requested in November were for recreational vessels that most likely could have passed under the draw at low tide without requiring a bridge opening.

As a result of the above information the Coast Guard believes that the best time period to perform this vital work and minimize the impacts on marine users is November through April.

### Request for Comments

We encourage you to participate in this rulemaking by submitting comments or related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD01–05–074), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know if they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

### Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the First Coast Guard District, Bridge Branch, at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

**Background and Purpose**

The General Edwards SR1A Bridge at mile 1.7, across the Saugus River, has a vertical clearance of 27 feet at mean high water and 36 feet at mean low water. The existing regulations at 33 CFR 117.618 require the draw to open on signal, except that, from April 1 through November 30, midnight to 8 a.m. an eight-hour notice is required. From December 1 through March 31, an eight-hour notice is required at all times for bridge openings.

The bridge owner, the Department of Conservation and Recreation (DCR), asked the Coast Guard to temporarily change the drawbridge operation regulations to allow the bridge to remain in the closed position from November 1, 2005 through April 30, 2006, to facilitate structural rehabilitation construction at the bridge.

**Discussion of Proposed Rule**

This proposed change would suspend the existing drawbridge operation regulations, listed at 33 CFR § 117.618(b), and add a new temporary paragraph (d) to allow the bridge to remain in the closed position from November 1, 2005 through April 30, 2006.

The Coast Guard believes this proposed rule is reasonable because bridge openings are rarely requested during the time period the SR1A Bridge will be closed for these repairs and the fact that this work is vital, necessary, and must be performed in order to assure the continued safe and reliable operation of the bridge.

**Regulatory Evaluation**

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security (DHS).

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation, under the regulatory policies and procedures of DHS is unnecessary.

This conclusion is based on the fact that the bridge rarely opens during the November through April time period.

**Small Entities**

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under section 5 U.S.C. 605(b), that this proposed rule would not have a significant economic impact on a substantial number of small entities.

This conclusion is based on the fact that bridge openings are rarely requested during the November through April time period.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

**Assistance for Small Entities**

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact us in writing at, Commander (obr), First Coast Guard District, Bridge Branch, 408 Atlantic Avenue, Boston, MA. 02110–3350. The telephone number is (617) 223–8364. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

**Collection of Information**

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

**Federalism**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

**Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**Taking of Private Property**

This proposed rule would not effect a taking of private property or otherwise have taking implications under E.O. 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

**Civil Justice Reform**

This proposed rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Protection of Children**

We have analyzed this proposed rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and would not create an environmental risk to health or risk to safety that may disproportionately affect children.

**Indian Tribal Governments**

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**Energy Effects**

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs

has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

**Technical Standards**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies. This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

**Environment**

We have analyzed this proposed rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environment documentation because it has been determined that the promulgation of operating regulations or procedures for drawbridges are categorically excluded.

**List of Subjects in 33 CFR Part 117**

Bridges.

**Regulations**

For the reasons set out in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

## PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; Department of Homeland Security Delegation No. 0170.1; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. From November 1, 2005 through April 30, 2006, § 117.618(b) is suspended and a new paragraph (d) is added to read as follows:

**§ 117.618 Saugus River.**

* * * * *

(d) The draw of the General Edwards SR1A Bridge at mile 1.7, need not open for the passage of vessel traffic from November 1, 2005 through April 30, 2006.

Dated: September 18, 2005.

**David P. Pekoske,**

*Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.*

[FR Doc. 05–19583 Filed 9–27–05; 12:13 pm]

**BILLING CODE 4910–15–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 62

**[RO4–OAR–2005–NC–0003–200532(b); FRL–7976–6]**

### Approval and Promulgation of State Plan for Designated Facilities and Pollutants; North Carolina

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA proposes to approve the Clean Air Act (CAA) section 111(d)/129 State Plan submitted by the North Carolina Department of Environment and Natural Resources (North Carolina DENR) for the State of North Carolina on August 7, 2002, and subsequently revised on December 14, 2004, for implementing and enforcing the Emissions Guidelines applicable to existing Commercial and Industrial Solid Waste Incinerators. The State Plan was submitted by North Carolina DENR to satisfy CAA requirements. In the final rules section of this **Federal Register**, EPA is approving the North Carolina State Plan as a direct final rule without prior proposal because the Agency views this as a noncontroversial plan and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to the direct final rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this rule. Any parties interested in commenting on this rule should do so at this time.

**DATES:** Comments must be received in writing by October 31, 2005.

**ADDRESSES:** All comments should be addressed to: Joydeb Majumder, EPA Region 4, Air Toxics and Monitoring Branch, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Please follow the detailed instructions described in the direct final rule, **ADDRESSES** section which is published in the Rules section of this **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Joydeb Majumder at (404) 562–9121.

**SUPPLEMENTARY INFORMATION:** For additional information see the direct final rule which is published in the Final Rules section of this **Federal Register**.

Dated: September 19, 2005.

**A. Stanley Meiburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 05–19351 Filed 9–28–05; 8:45 am]

**BILLING CODE 6560–50–P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

### 50 CFR Part 17

### Endangered and Threatened Wildlife and Plants; Revised 12-Month Finding for the Southern Rocky Mountain Distinct Population Segment of the Boreal Toad (*Bufo boreas boreas*)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of revised 12-month finding for the Southern Rocky Mountain Distinct Population Segment of the Boreal Toad.

**SUMMARY:** We, the Fish and Wildlife Service (Service), announce our revised 12-month finding for a petition to list the Southern Rocky Mountain population (SRMP) of the boreal toad (*Bufo boreas boreas*) as endangered under the Endangered Species Act (ESA). After a review of the best available scientific and commercial information, we find that listing is not warranted at this time because the SRMP of the boreal toad does not constitute a species, subspecies, or distinct population segment (DPS) under the ESA. Therefore, we withdraw the SRMP from the candidate list. The Service will continue to seek new information on the taxonomy, biology, and ecology of these toads, as well as potential threats to their continued existence.

**DATES:** This finding was made on September 20, 2005. Although no further action will result from this finding, we request that you submit new

information concerning the taxonomy, biology, ecology, and status of the SRMP or other populations of the subspecies, as well as potential threats to their continued existence, whenever it becomes available.

**ADDRESSES:** The complete file for this finding is available for inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service Ecological Services Field Office, 764 Horizon Drive, Building B, Grand Junction, Colorado 81506–3946. Submit new information, materials, comments, or questions concerning this species to us at the above address.

**FOR FURTHER INFORMATION CONTACT:** Allan Pfister, Western Colorado Supervisor, at the address listed above, by telephone at 970–243–2778, extension 29, by facsimile at 970–245–6933, or by e-mail *al_pfister@fws.gov.*

**SUPPLEMENTARY INFORMATION:**

## Background

Section 4(b)(3)(B) of the ESA requires that within 12 months after receiving a petition to revise the List of Endangered and Threatened Wildlife that contains substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings: the petitioned action is not warranted, the petitioned action is warranted, or the petitioned action is warranted but precluded by other pending proposals of higher priority. Such 12-month findings are to be published promptly in the **Federal Register.** The ESA also requires that when a warranted but precluded finding is made, a petition is treated as resubmitted and the Service is required to publish a new petition finding on an annual basis.

On September 30, 1993, the Service received a petition from the Biodiversity Legal Foundation, Boulder, Colorado, and Dr. Peter Hovingh, a researcher at the University of Utah, Salt Lake City, Utah. The petitioners requested that the Service list the SRMP of the ''western boreal toad'' (*Bufo boreas boreas*) as endangered throughout its range in northern New Mexico, Colorado, and southern Wyoming, as well as designate critical habitat in all occupied areas and in the key unoccupied areas where restoration is necessary. A notice of a 90-day finding for the petition was published in the **Federal Register** on July 22, 1994 (59 FR 37439), indicating that the petition and other readily available scientific and commercial information presented substantial information that the petitioned action may be warranted.

In 1994, a Boreal Toad Recovery Team (Team) was formed of agency representatives from the Service, Colorado Division of Wildlife, Wyoming Game and Fish Department, New Mexico Department of Game and Fish, National Park Service, U.S. Geological Survey, U.S. Environmental Protection Agency, U.S. Forest Service, and U.S. Bureau of Land Management, along with technical advisors from several universities and other interested parties. The Team produced a recovery plan for the boreal toad in Colorado, a draft Conservation Strategy, and a draft Conservation Agreement; in 1998, components of these documents were combined in the production of the Boreal Toad Conservation Plan, which has since been revised (Loeffler 2001). Management activities guided by the Team include annual monitoring of known breeding populations; research of factors limiting toad survival; research of toad habitat, biology, and ecology; captive breeding and rearing techniques and protocols; experimental reintroductions of toads to vacant historic habitat; coordination with land management agencies, land use planners, and developers to protect the boreal toad and its habitats; and efforts to increase public education and awareness of the subspecies.

On March 23, 1995, the Service announced a 12-month finding that listing the SRMP of the boreal toad (*Bufo boreas boreas*) as an endangered species was warranted but precluded by other higher priority actions (60 FR 15281). When we find that a petition to list a species is warranted but precluded, we refer to it as a candidate for listing. Section 4(b)(3)(B) of the ESA directs that, when we make a ''warranted but precluded'' finding on a petition, we are to treat the petition as being one that is resubmitted annually on the date of the finding; thus the ESA requires us to reassess the petitioned actions and to publish a finding on the resubmitted petition on an annual basis. Several candidate assessments for the boreal toad have been completed; these are available for viewing online at *http://www.fws.gov/endangered/candidates/index.html.* The most recent assessment was published in the **Federal Register** May 11, 2005 (70 FR 24870).

In our most recent Notice of Findings on Resubmitted Petitions, we noted that a proposed listing determination for the boreal toad would be funded in Fiscal Year 2005 (70 FR 24870, May 11, 2005). This resubmitted 12-month finding evaluates new information and re-evaluates previously acquired information. In accordance with section 4(b)(3)(B) of the ESA, we have now completed a status review of the best available scientific and commercial information on the species, and have reached a determination regarding the petitioned action.

## Species Information

The western toad (*Bufo boreas*) is an amphibian that occurs throughout much of the western United States. The species was first described by Baird and Girard (1852). Camp (1917) considered two forms as subspecies, the boreal toad (*B. b. boreas*) and the California toad (*B. b. halophilus*). Stebbins (1985) recognizes these two subspecies. Crother et al. (2003) note the general recognition of two nominal subspecies (*B. b. boreas* and *B. b. halophilus*), with the Amargosa toad (*B. b. nelsoni*) sometimes recognized as a third subspecies. Stebbins (1985) considers the Amargosa toad (*Bufo nelsoni*) to be a distinct species. The geographic variation within *Bufo boreas* is poorly studied and may mask a number of cryptic species (Crother et al. 2003). Recent DNA (deoxyribonucleic acid) analyses suggest a taxonomic change to the complex may be warranted (Goebel 1996).

The range of the boreal toad subspecies (*B. b. boreas*) is coastal Alaska south through British Columbia, western Alberta, Washington, Oregon, northern California, western and central Nevada, Idaho, western Montana, western and south central Wyoming, the mountains of Utah and Colorado, and extreme northern New Mexico. The range of the California toad subspecies (*B. b. halophilus*) is northern California south to the Baja peninsula of Mexico, and east to western Nevada. The ranges of the California toad and the boreal toad overlap in northern California (Stebbins 1985). The SRMP of the boreal toad (*B. b. boreas*) is the segment of the subspecies that is the focus of this finding, and refers to the toads occurring within the southern Rocky Mountain physiographic province. This region extends from south central Wyoming, throughout the mountainous portions of Colorado, and into extreme northern New Mexico.

Boreal toads in the SRMP may reach a length (snout to vent) of 11 centimeters (4 inches) (Hammerson 1999). They possess warty skin, oval parotid glands, and often have a distinctive light mid-dorsal stripe. During the breeding season, males develop a dark patch on the inner surface of the innermost digit. Unlike other *Bufo* species, the boreal toad has no vocal sac and, therefore, no mating call (Hammerson 1999). Tadpoles are black or dark brown. The eggs are black

and are deposited in long double layer jelly strings with one to three rows of eggs (Hammerson 1999).

In the southern Rocky Mountains, adult boreal toads emerge from winter refugia when snowmelt has cleared an opening from their burrows and daily temperatures remain above freezing (Campbell 1970a, b). Breeding occurs during a 2- to 4-week period from mid-May to mid-June at lower elevations, and as late as mid-July at higher elevations (Hammerson 1999). Suitable breeding sites are large bodies of water or small pools, beaver ponds, glacial kettle ponds, roadside ditches, human-made ponds, and slow-moving streams (Campbell 1970a; Hammerson 1999).

Females lay up to 16,500 eggs in 2 strings, which ordinarily are deposited in shallow water (Stebbins 1954). Carey et al. (2005) reported an overall mean clutch size of 6,661 eggs for 3 populations studied in Colorado. Eggs hatch 1 to 2 weeks after being laid. Egg and tadpole development is temperature-dependent, and reproductive efforts may fail if tadpoles do not have sufficient time to metamorphose before the onset of winter. Persistent, shallow bodies of water are critical to breeding success, and if the breeding site dries before metamorphosis is complete, desiccation of the tadpoles or eggs will occur. Tadpoles typically metamorphose by late July to late August, but at higher elevations metamorphosis may not be complete until late September (Loeffler 2001). Recently metamorphosed toadlets aggregate within a few meters of the water, and move into nearby moist habitats later in summer. After mating, adults often disperse to upland, terrestrial habitats, where they are mostly diurnally active in early and late summer (Mullally 1958; Campbell 1970a; Carey 1978), foraging primarily on ants, beetles, spiders, and other invertebrates (Schonberger 1945; Campbell 1970a). Late in the summer home ranges will expand, generally in the direction of wintering habitats (Campbell 1970a), which include cavities among streamside boulders, ground squirrel burrows, and beaver lodges and dams (Hammerson 1999).

Survival of embryos from laying to hatching is normally high but catastrophic mortality has been observed (Blaustein and Olson 1991). Survival of tadpoles and juveniles is very low, with predation and adverse environmental conditions primarily responsible for mortality at these life stages (Campbell 1970a). Samollow (1980) estimated that 95 to 99 percent die before reaching their second year of life. The minimum age of breeding boreal toads in Colorado is about 4 years in males and 6 years in females (Hammerson 1999). Olson (1991) found that females may skip 1 to 3 years between breeding attempts. Individuals may live approximately 11 or 12 years (Olson 1991).

**Distinct Vertebrate Population Segment**

Pursuant to the ESA, we must consider for listing any species, subspecies, or, for vertebrates, any DPS of these taxa if there is sufficient information to indicate that such action may be warranted. To interpret and implement the DPS provision of the ESA and congressional guidance, the Service and the National Marine Fisheries Service published, on December 21, 1994, a draft Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the ESA and invited public comments on it (59 FR 65885). After review of comments and further consideration, the Services adopted the interagency policy as issued in draft form, and published it in the **Federal Register** on February 7, 1996 (61 FR 4722). This policy addresses the recognition of DPSs for potential listing actions. The policy allows for more refined application of the ESA that better reflects the biological needs of the taxon being considered, and avoids the inclusion of entities that do not require its protective measures.

Under our DPS policy, three elements are considered in a decision regarding the status of a possible DPS as endangered or threatened under the ESA. These are applied similarly for additions to the list of endangered and threatened species, reclassification, and removal from the list. They are: discreteness of the population segment in relation to the remainder of the taxon; the significance of the population segment to the taxon to which it belongs; and the population segment's conservation status in relation to the ESA's standards for listing (*i.e.*, is the population segment, when treated as if it were a species, endangered or threatened?). Discreteness refers to the isolation of a population from other members of the species and we evaluate this based on specific criteria. If a population segment is considered discrete, the Service must consider whether the discrete segment is ''significant'' to the taxon to which it belongs. We determine significance by using the best available scientific information to determine the DPS's importance to the taxon to which it belongs. If we determine that a population segment is discrete and significant, we then evaluate it for endangered or threatened status based on the ESA's standards. The DPS evaluation in this finding concerns the SRMP segment of the boreal toad subspecies (*B. b. boreas*), occurring within the southern Rocky Mountain physiographic province extending from south central Wyoming through the mountainous portions of Colorado and into extreme northern New Mexico.

**Discreteness**

Under our DPS Policy, a population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA. The SRMP meets the first condition for the following reasons:

Based on evidence of feasible dispersal distances, the SRMP is geographically (physically) separated from other populations of the boreal toad (Keinath and McGee 2005). The greatest recorded distance of movement for a boreal toad in the southern Rocky Mountains is 8 kilometers (5 miles) (Lambert 2003) and most movements are smaller (Bartelt 2000; Jones 2000; Muths 2003). Southern Wyoming toads (within the SRMP) are separated from the northern Wyoming populations (outside the SRMP) by approximately 160 kilometers (100 miles) of dry, non-forested valleys and basins of the Red Desert (Keinath and McGee 2005). The boreal toad has never been observed in the Red Desert, and its highest elevations (2,000 m (6,562 ft)) are below the lowest elevation (2,300 m (7,546 ft)) of boreal toad occurrences in Wyoming. The habitat in riparian areas along rivers at these lower elevations is warmer, drier, and composed of much different vegetation, creating a barrier to migrating boreal toads (Keinath and McGee 2005). The large size and arid, inhospitable habitat make the Red Desert impassible for migrating toads. The SRMP also is geographically separated from other boreal toad populations to the west. Over 250 kilometers (155 miles) of arid habitat exists in eastern Utah and northwestern Colorado, physically separating the

SRMP from the Utah populations in the Wasatch and Uinta Mountains.

Morphological differences between toads of the SRMP and other boreal toad populations provide evidence of the geographic separation of the SRMP. Burger and Bragg (1947) noted several morphological differences between adults collected in Colorado and the Pacific Northwest, including differences in body length, skin coloration and texture, head proportion, and parotid gland shape and position. In the former, the dorsal coloration is darker and the skin between the warts is smoother and less pronounced. In the Colorado toads, the parotid gland is more oblong and less elevated, ventral markings are more numerous and irregular, and the head is proportionately larger and broader. The maximum length of the Colorado toads was 8.3 centimeters (3.3 inches) compared with 12.5 centimeters (4.9 inches) in the Pacific Northwest toads (Burger and Bragg 1947). However, these observations were based on cursory examination of a few specimens from one Colorado geographic area, and many more specimens and observations of the boreal toad throughout its range were deemed necessary to clarify the status of the Colorado toads (Burger and Bragg 1947). Hubbard (1972) also noted morphological differences between boreal toads in Colorado and British Columbia, Canada, as well as behavioral and biochemical differences. British Columbia toads were observed to possess much brighter and more variable coloration, and a smaller parotid gland than Colorado specimens; the distress call of toads in Colorado did not have a decrease in frequency of terminal segments of harmonics, which toads in British Columbia possess; and a serum protein analysis indicated toads from British Columbia have greater proportions of alpha-2 globulin and albumin and less alpha-1 globulin than those from Colorado (Hubbard 1972). However, comparisons of these characters within and between several additional boreal toad populations would be necessary to further substantiate the distinctiveness of toads in Colorado and the remainder of the SRMP.

Based on its current geographic (physical) separation from other boreal toad populations, and some morphological and genetic differences, we conclude the SRMP meets the definition of discreteness under our DPS policy.

**Significance**

If a population segment is determined to be discrete, the Service considers the available scientific evidence of its significance to the taxon to which it belongs. Our policy states that this consideration may include, but is not limited to, the following:

(1) Persistence of the discrete population segment in an ecological setting unusual or unique for the taxon;

(2) Evidence that loss of the discrete population segment would result in a significant gap in the range of the taxon;

(3) Evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; or

(4) Evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

A population segment needs to satisfy only one of these criteria to be considered significant. Furthermore, the list of criteria is not exhaustive; other criteria may be used, as appropriate.

*Persistence of the Discrete Population Segment in an Ecological Setting Unusual or Unique for the Taxon* —The boreal toad occurs from the Rocky Mountains to the Pacific Coast. Throughout its range, the subspecies shows an unusual plasticity in its choice of habitats (Campbell 1970a). In the SRMP, toads inhabit montane wetland habitats and adjacent uplands near suitable breeding habitats. These are ecological settings similar to those used by populations of the boreal toad outside the SRMP, in the montane regions of northern Wyoming, Idaho, Utah, Montana, and other western states. Generally speaking, in the higher latitudes of its range suitable boreal toad habitats may be found at lower elevations. We do not find that the SRMP persists in an ecological setting unusual or unique for the subspecies.

*Loss Would Represent a Significant Gap in the Range of the Taxon*—Loss of the SRMP would reduce the range of *B. b. boreas* at its southeastern-most extension, from south central Wyoming, through the mountainous regions of Colorado, and into extreme northern New Mexico. The remaining range would extend from coastal Alaska south through British Columbia, western Alberta, Washington, Oregon, northern California, western and central Nevada, Idaho, western Montana, Utah, and western Wyoming. Due to the broad geographic range of *B. b. boreas* across the western United States, the gap resulting from loss of the SRMP would be a relatively small proportion of the overall subspecies range and not significant.

Our analysis used the currently accepted taxonomy and range determinations for the parent taxon (the *B. b. boreas* subspecies) and the population segment under consideration (the SRMP). At this time, uncertainty exists with regard to the taxonomy of the *Bufo boreas* complex, including the designation of a single boreal toad subspecies, the distinctness of the SRMP segment, and the taxonomic status of other population segments in the Rocky Mountains. The geographic variation within *Bufo boreas* is poorly studied, and this lack of information is thought to mask the existence of other species (Crother *et al.* 2003). The results from phylogenetic analyses of the *Bufo boreas* group confirm this uncertainty, as they suggest the existence of evolutionary lineages inconsistent with the current taxonomy (Goebel 1996, 2005).

If new taxonomic information becomes available that could change our analysis, we will reconsider our decision. However, based on the best available information, we cannot conclude at this time that loss of the SRMP would represent a significant gap in the range of the subspecies.

*The Only Surviving Natural Occurrence of a Taxon*—This criterion from the DPS policy does not apply because the SRMP of the boreal toad is clearly not a ''population segment representing the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range.'' If this situation changes or new information becomes available, we will reconsider our decision.

*Evidence that the SRMP Differs Markedly from Other Populations in Genetic Characteristics*—In our consideration of ''significance,'' the Service must evaluate evidence to determine whether the SRMP differs markedly from other populations belonging to the currently recognized subspecies, *B. b. boreas.* Information from mitochondrial DNA data (Goebel 1996, 1999, 2000, 2003, 2005) and nuclear DNA data (Goebel 1999, 2000, 2003) suggests that boreal toads of the SRMP differ genetically from other populations, but the differences between the SRMP and toads in central and northern Utah, southeastern Idaho, and western Wyoming are small, not well resolved, and based on small sample sizes.

A notable result of the mitochondrial DNA studies is that, in each study, specimens sampled from the SRMP cluster within the same phylogeographic clade, which is a group considered to be of common evolutionary origin. However, the specimens from the SRMP did not form

a monophyletic clade; depending on the study or analysis method, specimens from northern Utah, central Utah, and western Wyoming group with the SRMP (Goebel 1996, 1999, 2000, 2003, 2005). The lack of observed monophyly may be due to poor resolution that additional samples and sequence data might improve (Goebel 1999, 2000). It may also suggest that toads in the SRMP are very closely related to nearby populations due to recent (in geologic time) geographic isolation of the SRMP (Goebel 1999). While the current mitochondrial DNA data suggest the existence of diverging evolutionary lineages in the *Bufo boreas* group, the toads appear to be so closely related that interbreeding would likely produce viable offspring (Goebel 2003).

The close relationships between the SRMP and nearby populations may also be due to the retention of ''old'' haplotypes from lineage sorting (Goebel 1999, 2000). From a phylogenetic viewpoint the entire mitochondrial DNA genome constitutes a single locus inherited as a linked unit (Avise 2000). Therefore, analyses based on the mitochondrial genome could produce patterns that represent the gene's lineage, but not necessarily the true evolutionary direction of the species. For this reason, when analyzing the historical relationships among taxa it is prudent to compare phylogenetic hypotheses from both mitochondrial data and nuclear data (which represent a large number of loci).

Studies of the *Bufo boreas* group using nuclear DNA data have been performed, but the results were affected by small sample sizes from some localities and exclusion of samples due to missing data (Goebel 1999, 2000). When later analyses were performed with additional samples, a nuclear DNA clade containing the SRMP was identified, but it included specimens from western Wyoming localities geographically separated from the SRMP (Goebel 2003).

We believe that additional nuclear (*e.g.* micro satellite) DNA data and supplemental mitochondrial DNA sequence data are necessary to clarify the genetic relationships within and between boreal toad populations, including the SRMP segment and others in the Rocky Mountains. The multi-agency Team also recommends additional studies, on the grounds that genetic distinctions between SRMP toads and nearby toad populations are based on data from too few specimens (Loeffler 2001). After considering the best available information, we cannot conclude that the SRMP differs markedly from other boreal toad populations in genetic characteristics.

In conclusion, we determine that the SRMP, as currently described, does not meet the significance criteria of our DPS policy. As such, the SRMP does not qualify as a distinct population segment. Therefore, it is not a listable entity under the ESA. Based on this determination, we withdraw the SRMP from the candidate list.

We will accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding. We will reconsider this determination in the event that new information indicates that the SRMP is significant.

### References

A complete list of all references cited herein is available upon request from the Grand Junction, Colorado Office, U.S. Fish and Wildlife Service (see **ADDRESSES**).

### Author

The primary author of this finding is Larry Thompson, Grand Junction, Colorado Office, U.S. Fish and Wildlife Service (see **ADDRESSES**).

**Authority:** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: September 20, 2005.

**Marshall P. Jones, Jr.,**

*Director, U.S. Fish and Wildlife Service.*

[FR Doc. 05–19488 Filed 9–28–05; 8:45 am]

**BILLING CODE 4310–55–P**

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 224

**[I.D. 081605A]**

## Endangered and Threatened Species; Petition to Initiate Emergency Rulemaking to Prevent the Extinction of the North Atlantic Right Whale; Final Determination

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; response to petition; final determination.

**SUMMARY:** NMFS received a petition dated May 19, 2005 co-signed by Defenders of Wildlife, International Fund for Animal Welfare, International Wildlife Coalition, National Environmental Trust, Natural Resources Defense Council, Oceana, The Humane Society of the United States, The Ocean Conservancy, and Whale and Dolphin Conservation Society, requesting that NMFS ''promulgate emergency regulations, within sixty days, to slow and/or re-route vessels within right whale habitat, as a means of protecting the species until such time as permanent measures can be enacted. Such emergency regulations should require all ships entering and leaving all major East Coast ports to travel at speeds of 12 knots or less within 25 nautical miles of port entrances during expected right whale high-use periods.'' NMFS has determined that the petition is not warranted at this time.

**ADDRESSES:** Further information on the North Atlantic Right Whale program can be found on NMFS' internet websites at *www.nmfs.noaa.gov/pr/shipstrike/* and at *www.nero.noaa.gov/shipstrike/*. Comments and requests for copies of this determination should be addressed to the Chief, Marine Mammal and Turtle Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** P. Michael Payne; Phone: 301–713–2322; Fax: 301–427–2522.

**SUPPLEMENTARY INFORMATION:**

### Background

The North Atlantic right whale, *Eubalaena glacialis*, is considered one of the most endangered large whale populations in the world. Right whales have been listed as endangered under the Endangered Species Act (ESA) since its passage in 1973 (35 FR 8495, June 2, 1970). Although precise estimates of abundance are not available, it appears that the eastern North Atlantic population is nearly extinct and the western North Atlantic population numbers approximately 300 whales. The status of North Atlantic right whales is a very serious issue for NMFS. While calf production has increased somewhat in recent years, recovery is seriously affected by fatalities and serious injury resulting from human activities, primarily from entanglement in fishing gear and collisions with ships.

NMFS has been working with state and other Federal agencies, concerned citizens and citizen groups, environmental organizations, and the shipping industry to address the ongoing threat of ship strikes to North Atlantic right whales as part of its responsibilities related to right whale recovery. NMFS has established a right whale ship strike reduction program, that includes among other things, aerial

surveys to notify mariners of right whale sighting locations; the operation of Mandatory Ship Reporting systems to provide information to mariners entering right whale habitat; interagency collaboration to address the threat; and consultations under section 7 of the ESA.

NMFS has developed a multi year, wide-ranging Ship Strike Reduction Strategy. The draft Strategy was published as an Advance Notice of Proposed Rulemaking (ANPR) (69 FR 30857, June 1, 2004), and a series of public meetings were held on the ANPR. NMFS is currently analyzing its various measures and alternatives. A Notice of Intent to prepare a Draft Environmental Impact Statement under the National Environment Policy Act has been published (70 FR 36121, June 22, 2005), and this analysis is underway. The draft Strategy and its alternatives identify a set of protective measures that include proposed routing changes and ship speed restrictions along the eastern seaboard.

**Final Determination of Petition**

NMFS acknowledges the receipt of the petition for emergency rulemaking. As noted above, NMFS is in the process of analyzing a broad draft ship strike reduction strategy that includes potential operational measures such as routing changes and ship speed restrictions along the eastern seaboard. Promulgating a separate 12–knot speed limit, at this time, would curtail full public notice, comment and environmental analysis, duplicate agency efforts and reduce agency resources for a more comprehensive strategy, as well as risk delaying implementation of the draft Strategy. Instead of imposing measures in piecemeal fashion, NMFS continues to believe that putting a comprehensive strategy in place is the best course of long-term action.

NMFS is enhancing its non-regulatory measures to reduce ship strikes and will proceed with analysis and rulemaking to implement specific regulatory measures of the comprehensive ship strike reduction strategy in the coming months.

NMFS will continue to work with other Federal agencies, especially with regard to completing or initiating further consultations under section 7(a) of the ESA. The intent of these informal and formal discussions is to ensure that routine vessel operations, or special activities involving vessels, are not likely to jeopardize the continued existence of right whales or destroy or adversely modify right whale critical habitat.

As part of the draft Strategy, the U.S. Coast Guard (USCG) is conducting Port Access Route Studies (70 FR 8312, February 18, 2005) on two routing changes (one in Cape Cod Bay, and one in right whale critical habitat in waters off Florida and Georgia). The USCG analysis will assess potential navigational problems should the routes be imposed. The USCG is required to provide its recommendations on the proposed routes in a report to Congress by early 2006.

In the meantime, NMFS is also issuing information on right whales, their vulnerability to ship strikes, and advisories to ships to slow to 12 knots or less when transiting areas occupied by right whales on NOAA Weather Radio broadcasts, as well as issuing the same information in revisions to the U.S. Coast Pilots and other mariner navigational aides. Moreover, NMFS has increased efforts to educate mariners on steps they can take to reduce the likelihood of a ship strike.

**Authority**

The authority for this action is 5 U.S.C. 555(e) and 16 U.S.C. 1531, *et seq.*

Dated: September 22, 2005.

**James H. Lecky,**

*Director, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 05–19372 Filed 9–28–05; 8:45 am]

BILLING CODE 3510–22–S

# Notices

Federal Register

Vol. 70, No. 188

Thursday, September 29, 2005

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

## DEPARTMENT OF AGRICULTURE

### Submission for OMB Review; Comment Request

September 23, 2005.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

**Animal and Plant Health Inspection Service**

*Title:* National Animal Identification System.

*OMB Control Number:* 0579–0259.

*Summary of Collection:* The Animal and Plant Health Inspection Service (APHIS) regulates the importation and interstate movement of animals and animal products and conducts various other activities to protect the health of our Nation's livestock and poultry. The advent of increased animal disease outbreaks around the globe over the past decade, especially the recent BSE-positive cow found in Washington State, has intensified the public interest in developing a national animal identification program for the purpose of protecting animal health. Fundamental to controlling any disease threat, foreign or domestic, to the Nation's animal resources is to have a system that can identify individual animals or groups, the premises where they are located, and the date of entry to each premises. A national animal identification system is being implemented by APHIS at present on a voluntary basis. It is intended to identify all livestock, as well as record their movements over the course of their lifespan.

*Need and Use of the Information:* APHIS goal is to create an effective, uniform, consistent, and efficient system that when fully implemented, will allow traces to be completed within 48 hours of detection of a disease, ensuring rapid containment of the disease. Successful implementation of the animal identification and tracking systems will depend on the effective use of three primary information collection activities: premises and nonproducer participants identification records, individual animal identification transaction records, and group/lot transaction records that will be created and maintained through various industry and Government collaborative efforts.

Failing to collect the needed information would make it impossible to conduct a timely traceback of animals potentially exposed to a disease of concern.

*Description of Respondents:* State, local or tribal government; Farms; Business or other for-profit

*Number of Respondents:* 250,000.

*Frequency of Responses:* Recordkeeping; Reporting: On occasion.

*Total Burden Hours:* 255,000.

**Ruth Brown,**

*Departmental Information Collection Clearance Officer.*

[FR Doc. 05–19428 Filed 9–28–05; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

**[Docket No. 05–022–1]**

### Notice of Request for Approval of an Information Collection; Voluntary ''Do Not Sell'' List of Invasive Plant Species

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** New information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request approval of a new information collection activity associated with a voluntary ''do not sell'' list of invasive plant species for Florida nurseries.

**DATES:** We will consider all comments that we receive on or before November 28, 2005.

**ADDRESSES:** You may submit comments by either of the following methods:

- EDOCKET: Go to *http://www.epa.gov/feddocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once you have entered EDOCKET, click on the ''View Open APHIS Dockets'' link to locate this document.
- Postal Mail/Commercial Delivery: Please send four copies of your comment (an original and three copies) to Docket No. 05–022–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 05–022–1.

*Reading Room:* You may read any comments that we receive on this docket in our reading room. The reading room is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 690–2817 before coming.

*Other Information:* You may view APHIS documents published in the **Federal Register** and related information on the Internet at *http://www.aphis.usda.gov/ppd/rad/webrepor.html.*

**FOR FURTHER INFORMATION CONTACT:** For information on the voluntary ''do not sell'' list of invasive plant species for Florida nurseries, contact Dr. Barney Caton, Ecologist and Pest Risk Analyst, Center for Plant Health Science and Technology, PPQ, 1730 Varsity Drive, Suite 300, Raleigh, NC 27607; (919) 855–7504. For copies of more detailed information on the information collection, contact Mrs. Celeste Sickles, APHIS's Information Collection Coordinator, at (301) 734–7477.

**SUPPLEMENTARY INFORMATION:**

*Title:* Voluntary ''Do Not Sell'' List of Invasive Plant Species.

*OMB Number:* 0579–XXXX.

*Type of Request:* Approval of a new information collection.

*Abstract:* In 2001, the Florida Nursery, Growers, & Landscape Association (FNGLA), in cooperation with the Florida Exotic Pest Plant Council (FLEPPC), created and promoted a list of known invasive plant species that should not be grown or sold in Florida nurseries. Forty-three plant species were chosen for the list. A voluntary effort by nurseries to limit trade in these species is a potentially worthwhile approach to safeguarding U.S. ecosystems from invasive plants. The effectiveness of the voluntary program on trade in these species since 2001 has not been fully studied, however.

The Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture is responsible for safeguarding the United States against plant pests and noxious weeds. A recent assessment by the Center for Plant Health Science and Technology, Plant Protection and Quarantine, APHIS, indicated that availability in Florida nurseries of the 43 species on the FNGLA list has not changed since 1999. APHIS proposes to conduct a single survey of owners and managers of Florida nurseries and plant dealers to determine how many were aware of the program, whether they were complying if they were aware of it, and whether they would have complied if they had known about it. The results of the survey will help APHIS learn how well such voluntary ''do not sell'' programs may be accepted by owners and managers of nurseries and plant dealers and how effective such programs may be.

We are asking the Office of Management and Budget (OMB) to approve the information collection activity associated with the voluntary ''do not sell'' list of invasive species for Florida nurseries.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public reporting burden for this collection of information is estimated to average 0.5 hour per response.

Respondents: Owners and managers of nurseries, and nursery stock dealers in Florida.

*Estimated annual number of respondents:* 200.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 200.

*Estimated total annual burden on respondents:* 100 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 23rd day of September 2005.

**Elizabeth E. Gaston,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 05–19453 Filed 9–28–05; 8:45 am]

**BILLING CODE 3410–34–P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Information Collection; Day Use on the National Forests of Southern California

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice; request for comment.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the extension information collection, Day Use on the National Forests of Southern California.

**DATES:** Comments must be received in writing on or before November 28, 2005.

**ADDRESSES:** Comments concerning this notice should be addressed to Dr. Deborah J. Chavez, Pacific Southwest Research Station, 4955 Canyon Crest Drive, Riverside, CA 92507. Comments also may be submitted via facsimile to (909) 680–1501, or send an e-mail to *dchavez@fs.fed.us.*

The public may inspect comments received at the address above during normal business hours. Visitors are encouraged to call ahead to (909) 680–1500 to facilitate entry to the building.

**FOR FURTHER INFORMATION CONTACT:** Dr. Deborah J. Chavez, Pacific Southwest Research Station, (909) 680–1558, e-mail to *dchavez@fs.fed.us.* Individuals who use telecommunication devices for the deaf may call the Federal Information Relay Service at 1–800–877–8339 twenty-four hours a day, every day of the year, including holidays.

**SUPPLEMENTARY INFORMATION:** *Title:* Day Use on the National Forests of Southern California.

*OMB Number:* 0596–0129.

*Expiration Date of Approval:* 3/31/2006.

*Type of Request:* Extension.

*Abstract:* Users of urban proximate National Forests in Southern California come from a variety of ethnic/racial, income, age, educational, and other socio-demographic backgrounds. The activities pursued, information sources utilized, and site attributes preferred are just some of the items affected by these differences. Past studies completed through previously approved collections

have provided baseline information from which managers have made decisions, revised forest plans, and renovated/redesigned recreation sites. Additional information is needed for the managers of National Forests in Southern California, in part to validate previous results and in part because of the continuously changing profile of the visitor population recreating on the National Forests of Southern California. In the absence of the resultant information from the proposed series, the Forest Service will be ill-equipped to implement management changes required to respond to the needs and preferences of day use visitors. Data will be collected from visitors at outdoor recreation day use sites (these include developed picnic areas, general forest day use sites, off-road staging areas, trails, etc.) on National Forests in Southern California. Sites, dates of data collection, and individuals participating in the study will be randomly selected for inclusion in the study. Survey instruments will be available in English and Spanish and bilingual research teams will collect the data. Participation in this study is voluntary. The maximum amount of completion time will average 15 minutes or less. Participants will answer questions on the following topics: socio-demographic profile; National Forest visitation history and patterns; activity patterns; information and communication; site amenities/characteristics; perceptions about the environment and land uses; and general comments. Urban National Forests in Southern California have used the information to assist in effective management of recreation activities in the region studied. Data collected previously has been used by the agency to institute forest newspapers, add site renovations to an existing picnic area, and in forest planning. Results have been presented at local, national and international meetings, and have been published in several outlets. Data generated through this collection will be utilized in a similar manner as well as provide opportunities for comparisons of visitor profile and use shifts over time. Data will be evaluated and analyzed by Dr. Deborah J. Chavez at the Pacific Southwest Research Station. Consequences for not collecting this data would be (a) decreased service delivery due to decreased quality and breadth of information provided to resource managers on the socio-demographic profile of visitors, visitation history and patterns, information and communication, site amenities/characteristics, perceptions about the environment and land uses, (b) decreased ability to continue to expand approved research work unit's assigned study topics such as understanding visitor profiles, (c) increased response time for inquiries into topics from managers and university contacts, (d) increased dependency on cooperator availability to carry out research unit mission, and (e) loss of information represented in follow-up longitudinal studies.

*Estimate of Annual Burden:* 15 minutes per respondent.

*Type of Respondents:* Recreation visitors to urban National Forests in Southern California.

*Estimated Annual Number of Respondents:* 600 per year.

*Estimated Annual Number of Responses per Respondent:* 1 per year.

*Estimated Total Annual Burden on Respondents:* 150 hours.

Comment is invited on: (1) Whether this collection of information is necessary for the stated purposes and the proper performance of the functions of the agency, including whether the information will have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including names and addresses when provided, will be a matter of public record. Comments will be summarized and included in the submission for Office of Management and Budget approval.

Dated: September 14, 2005.

**Ann M. Bartuska,**

*Deputy Chief for Research & Development.*

[FR Doc. 05–19424 Filed 9–28–05; 8:45 am]

**BILLING CODE 3410–11–U**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Notice of Madison-Beaverhead Advisory Committee Change of Meeting Date and Location

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of change in meeting date and location.

**SUMMARY:** Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393), the Beaverhead-Deerlodge National Forest's Madison-Beaverhead Resource Advisory Committee will meet on Tuesday, November 15, 2005, from 10 a.m. until 4 p.m. in Dillon, Montana, for a business meeting. The meeting is open to the public.

**DATES:** Tuesday, November 15, 2005.

**ADDRESSES:** The meeting will be held at the USDA Service Center in Dillon, Montana.

**FOR FURTHER INFORMATION CONTACT:** Thomas W. Heintz, Designated Forest Official (DFO), Forest Supervisor, Beaverhead-Deerlodge National Forest, at (406) 683–3937.

**SUPPLEMENTARY INFORMATION:** Agenda topics for this meeting includes electing a chair, hearing and deciding on proposals for projects to fund under Title II of Public Law 106–393, hearing public comments, and other business. If the meeting location changes, notice will be posted in local newspapers, including the Dillon Tribune and The Montana Standard.

Dated: September 23, 2005.

**Thomas W. Heintz,**

*Acting Forest Supervisor.*

[FR Doc. 05–19435 Filed 9–28–05; 8:45 am]

**BILLING CODE 3410–11–M**

## DEPARTMENT OF AGRICULTURE

### Forest Service

### Shasta County Resource Advisory Committee

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The Shasta County Resource Advisory Committee (RAC) will hold meetings at the USDA Service Center in Redding, California, on October 5, November 2, and December 7, 2005. The purpose of these meetings is to discuss proposed projects under Title II of the Secure Rural Schools and Community Self-Determination Act of 2000.

**DATES:** October 5, November 2, and December 7, 2005.

*Time:* 8 a.m.–12 noon.

*Location:* USDA Service Center, 3644 Avtech Parkway, Redding, California.

**FOR FURTHER INFORMATION CONTACT:** Michael Odle, Public Affairs Officer and RAC Coordinator, at the Shasta-Trinity National Forest Headquarters, 3644 Avtech Parkway, Redding, CA, 96002. (530) 226–2494 or *modle@fs.fed.us.*

**SUPPLEMENTARY INFORMATION:** These meetings are open to the public. Opportunity will be provided for public input and individuals will have the opportunity to address the Committee at that time.

Dated: September 23, 2005.

**J. Sharon Heywood,**

*Forest Supervisor.*

[FR Doc. 05–19553 Filed 9–27–05; 10:32 am]

**BILLING CODE 3410–11–M**

## CIVIL RIGHTS COMMISSION

### Senior Executive Service: Performance Review Board; Membership

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Notice of membership of the USCCR Performance Review Board.

**SUMMARY:** This notice announces the appointment of the Performance Review Board (PRB) of the United States Commission on Civil Rights. Publication of PRB membership is required by 5 U.S.C. 414(c)(4).

The PRB provides fair and impartial review to the U.S. Commission on Civil Rights' Senior Executive Service performance appraisals and makes recommendations regarding performance ratings and performance awards to the Staff Director, U.S. Commission on Civil Rights for the FY 2004 rating year.

**FOR FURTHER INFORMATION CONTACT:** Janice Minor, Human Resources Assistant, U.S. Commission on Civil Rights, 624 9th Street, NW., Washington, DC 20425, (202) 376–8364.

Members: Jill M. Crumpacker, Esq., Acting Executive Director, Chief Human Capital Officer, Federal Labor Relations Authority.

Robert A. Rogowsky, PhD., Director of Operations, U.S. International Trade Commission.

Karn Laney-Cummings, Director, Office of Industries, U.S. International Trade Commission.

**TinaLouise Martin,**

*Director, Office of Management, U.S. Commission of Civil Rights.*

[FR Doc. 05–19489 Filed 9–28–05; 8:45 am]

**BILLING CODE 6335–01–M**

## DEPARTMENT OF COMMERCE

### Foreign–Trade Zones Board

**Docket 44–2005**

### Foreign–Trade Zone 70 — Detroit, Michigan, Expansion of Manufacturing Authority — Subzone 70T, Marathon Petroleum Company LLC, Detroit, Michigan

An application has been submitted to the Foreign–Trade Zones (FTZ) Board (the Board) by the Greater Detroit Foreign Trade Zone, Inc., grantee of FTZ 70, requesting authority on behalf of Marathon Petroleum Company LLC (Marathon), to expand the scope of manufacturing activity conducted under zone procedures within Subzone 70T at the Marathon oil refinery complex in Wayne County (Detroit area), Michigan. The application was submitted pursuant to the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on September 19, 2005.

Subzone 70T (246 acres, 400 - 500 employees) consists of 4 sites and connecting pipelines in Wayne County (Detroit area), Michigan: *Site 1* (183 acres)--main refinery complex (75,000 BPD) located at 1300 South Fort Street on the Detroit River, Detroit and Melvindale ; *Site 2* (15 acres)--asphalt storage facility located at 301 South Fort Street on the Rouge River, 1 mile east of the refinery, Detroit; *Site 3* (4 acres)--finished product storage facility, located on Fordson Island in the Rouge River, 2 miles northeast of the refinery, Dearborn, and; *Site 4* (44 acres)--underground LPG storage cavern, located at 24400 Allen Road, 12 miles south of the refinery, Woodhaven. The expansion request involves the modification to a crude unit that would increase the overall crude distillation capacity to 105,000 BPD. No additional feedstocks or products have been requested.

Zone procedures would exempt the increased production from Customs duty payments on the foreign products used in its exports. On domestic sales of the increased production, the company would be able to choose the finished product duty rate on certain petrochemical feedstocks and refinery by–products (duty–free) by admitting foreign crude oil in non–privileged foreign status. The duty rates on crude oil range from 5.25 cents/barrel to 10.5 cents/barrel. The application indicates that the savings from zone procedures help improve the refinery's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at one of the following addresses:

*1. Submissions Via Express/Package Delivery Services:* Foreign–Trade-Zones Board, U.S. Department of Commerce, Franklin Court Building - Suite 4100W, 1099 14th St. NW, Washington, D.C. 20005; or

*2. Submissions Via the U.S. Postal Service:* Foreign–Trade-Zones Board, U.S. Department of Commerce, FCB - Suite 4100W, 1401 Constitution Ave. NW, Washington, D.C. 20230.

The closing period for their receipt is November 28, 2005. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to December 13, 2005).

A copy of the application and accompanying exhibits will be available for public inspection at the Office of the Foreign–Trade Zones Board's Executive Secretary at address Number 1 listed above, and at the U.S. Department of Commerce Export Assistance Center, 211 West Fort Street, Suite 2220, Detroit, MI 48226.

Dated: September 22, 2005.

**Dennis Puccinelli,**

*Executive Secretary.*

[FR Doc. 05–19505 Filed 9–28–05; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**A–570–827**

### Notice of Decision of the Court of International Trade: Certain Cased Pencils from the People's Republic of China

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** On August 23, 2005, the Court of International Trade (CIT) sustained the Department of Commerce's (the Department's) redetermination regarding the 1999–2000 antidumping duty administrative review of certain cased pencils (pencils) from the People's Republic of China (PRC). Pursuant to the Court's remand order, in its redetermination the Department assigned Guangdong Provincial Stationery & Sporting Goods Import &

Export Corp. (Guangdong) a cash deposit rate of 13.91 percent, rather than the PRC–wide rate assigned to the company in the contested administrative review. Consistent with the decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *The Timken Company v. United States and China National Machinery and Equipment Import and Export Corporation*, 893 F. 2d 337 (Fed. Cir. 1990) (*Timken*), the Department is publishing this notice of the CIT's decision which is not in harmony with the Department's determination in the 1999–2000 antidumping duty administrative review of pencils from the PRC.

**EFFECTIVE DATE:** September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Magd Zalok or Howard Smith at (202) 482–4162 or (202) 482–5193, respectively; AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 28, 1994, the Department published the antidumping duty order on pencils from the PRC. *See Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 FR 66,909 (December 28, 1994). The Department excluded from this order Guangdong's U.S. sales of pencils produced by Three Star Stationery Industry Corp. (Three Star). However, in the final determination that gave rise to the antidumping duty order, the Department stated that if Guangdong sold subject merchandise to the United States that was produced by manufacturers other than Three Star, such sales would be subject to a cash deposit rate equal to the rate applied to the PRC entity. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic from China*, 59 FR 55625, 55627 (November 8, 1994), *see also Certain Cased Pencils From the People's Republic of China; Notice of Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order in Accordance With Final Court Decision*, 64 FR 25275 (May 11, 1999).

In the 1999–2000 antidumping duty administrative review of pencils from the PRC, the Department ''collapsed'' Three Star with another entity, China First Pencil Co. Ltd. (China First), based upon information that came to light late in the review. Further, the Department determined that the combined entity, China First/Three Star, was distinct from the Three Star whose factors of production formed the basis for excluding Guangdong from the order. Because there was no information on the record of the 1999–2000 review from which to calculate a dumping margin for Guangdong, consistent with the investigation in this proceeding, in the final results of review the Department assigned Guangdong's sales of China First/Three Star produced subject merchandise a cash deposit rate equal to the PRC–wide rate. *See Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 48,612 (July 25, 2002), as amended in *Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 FR 59,049 (September 19, 2002).

Respondents in the 1999–2000 administrative review filed a motion of judgement upon the agency record contesting the final results of that review. After considering the respondents' arguments, the CIT remanded the case to the Department instructing it to, among other things, reevaluate the PRC–wide rate applied to Guangdong because the Court found the Department had effectively applied adverse facts available to a participating and cooperative respondent. *See Kaiyuan Group Corp., et al v. United States and the Pencil Section Writing Instrument Manufacturers Ass'n, et al.*, 343 F. Supp. 2d 1289 (May 14, 2004) (*Kaiyuan I*). Consistent with the Court's direction, under protest, in its redetermination the Department assigned Guangdong a cash deposit rate based on the weighted–average of the margins calculated for other respondents in the 1999–2000 administrative review. On August 23, 2005, the CIT sustained the Department's remand redetermination. *See Kaiyuan Group Corp., et al v. United States and the Pencil Section Writing Instrument Manufacturers Association, et al.* Slip Op. 05–103 (*Kaiyuan II*).

**Notification**

In its decision in *Timken*, the Federal Circuit held that, pursuant to 19 U.S.C. 1516a(e), the Department must publish notice of a CIT decision which is ''not in harmony'' with the Department's determination. The CIT's decisions in *Kaiyuan I & II* regarding the rate assigned to Guangdong are not in harmony with the Department's determination in the final results of the 1999–2000 antidumping duty administrative review of pencils from the PRC. Therefore, publication of this notice fulfills the Department's obligation under 19 U.S.C. 1516a(e).

The Department will continue to suspend liquidation pending the expiration of the period to appeal the CIT's August 23, 2005, decision, or, if that decision is appealed, pending a ''conclusive'' decision by the Federal Circuit. Upon expiration of the period to appeal, or if the CIT's decision is appealed and the Federal Circuit's decision is not in harmony with the Department's determination in the 1999–2000 antidumping duty administrative review of pencils from the PRC, the Department will publish in the **Federal Register** a notice of amended final results for the 1999–2000 administrative review of pencils.

Dated: September 22, 2005.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 05–19506 Filed 9–28–05; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### International Trade Administration

**(A–570–504)**

### Continuation of Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China (''PRC'')

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the Department of Commerce (''the Department'') and the International Trade Commission (''ITC'') that revocation of the antidumping duty order on petroleum wax candles (''candles'') from the PRC would likely lead to continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing notice of the continuation of this antidumping duty order.

**EFFECTIVE DATE:** August 10, 2005

**FOR FURTHER INFORMATION CONTACT:** Maureen Flannery, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230; telephone: (202) 482–3020.

**SUPPLEMENTARY INFORMATION:**

**Background**

On August 2, 2004, the Department initiated and the ITC instituted a sunset review of the antidumping duty order on candles from the PRC pursuant to section 751(c) of the Act. *See Initiation of Five-year (''Sunset'') Reviews*, 69 FR 46134 (August 2, 2004). As a result of its review, the Department found that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail were the order to be revoked. *See Petroleum Wax Candles from the People's Republic of China; Final Results of the Expedited Sunset Review of the Antidumping Duty Order*, 69 FR 75302 (December 16, 2004).

On August 3, 2005, pursuant to section 751(c) of the Act, the ITC determined that revocation of the antidumping duty order on candles from the PRC would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Petroleum Wax Candles from the People's Republic of China*, Investigation 731–TA–282 (Second Review), 70 FR 44695 (August 3, 2005).

**Scope of the Order**

The products covered by this order are certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper–cored wicks. They are sold in the following shapes: tapers, spirals and straight–sided dinner candles; rounds, columns, pillars, votives; and various wax–filled containers. The products were originally classifiable under the Tariff Schedules of the United States item 755.25, Candles and Tapers. The products are currently classifiable under the Harmonized Tariff Schedule item number 3406.00.00. The Department determined several products were excluded from the scope of this order. For a complete list of the Department's scope rulings, please check our website at *http://www.ia.ita.doc.gov/download/candles–prc-scope*. Also, additional scope determinations are pending. The written description remains dispositive.

**Determination**

As a result of the determinations by the Department and the ITC that revocation of this antidumping duty order would be likely to lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping duty order on candles from the PRC.

U.S. Customs and Border Protection will continue to collect antidumping duty deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of continuation of this order is August 10, 2005. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next five-year review of this order not later than August 2010.

Dated: September 20, 2005.

**Joseph A. Spetrini,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 05–19508 Filed 9–28–05; 8:45 am]

**BILLING CODE 3510–DS–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[Docket No. 050906238–5243–02; I.D. 090705E]**

**RIN 0648–ZB68**

### 2006 Monkfish Research Set-Aside Program

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; solicitation for proposals for research activities; correction.

**SUMMARY:** NMFS corrects the notice, published on September 13, 2005, soliciting proposals for research activities to be conducted under the 2006 Monkfish Research Set-Aside (RSA) Program to be consistent with the full Federal Funding Opportunity Announcement (FFO). Specifically, NMFS is correcting the ''Evaluation Criteria'' contained in the September 13, 2005, notice to be consistent with the ''Evaluation Criteria'' contained in the FFO. All other requirements remain the same.

**DATES:** Applications must be received on or before 5 p.m. eastern standard time on October 13, 2005. Delays may be experienced when registering with Grants.gov near the end of a solicitation period. Therefore, NOAA strongly recommends that applicants do not wait until the deadline date to begin the application process through *http://www.grants.gov*.

**ADDRESSES:** Electronic application submissions must be transmitted on-line through *http://www.grants.gov*. Applications submitted through *http://www.grants.gov* will be accompanied by a date and time receipt indication on them. If an applicant does not have Internet access, hard copy proposals will be accepted, and date recorded when they are received in the program office. Paper applications must be sent to NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Electronic or hard copies received after the deadline will not be considered, and hard copy applications will be returned to the sender.

**FOR FURTHER INFORMATION CONTACT:** Information may be obtained from Paul Howard, Executive Director, New England Fishery Management Council (NEFMC), by phone 978–465–0492, or by fax 978–465–3116; Philip Haring, Senior Fishery Analyst, NEFMC, by phone 978–465–0492, or by e-mail at *pharing@nefmc.org*; or Allison Ferreira, Fishery Policy Analyst, NMFS, by phone 978–281–9103, by fax 978–281–9135, or by e-mail at *allison.ferreira@noaa.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 13, 2005, NMFS published a notice in the **Federal Register** announcing the 2006 Monkfish RSA Program (70 FR 54028). This program, established through Amendment 2 to the Monkfish Fishery Management Plan (FMP) to annually set aside 500 monkfish days-at-sea (DAS) from the total DAS allocated to limited access monkfish permit holders, is to be utilized for monkfish related research activities. The September 13, 2005, notice also solicited proposals for monkfish research activities to be conducted under this RSA program. However, the ''Evaluation Criteria'' listed on pages 54029 and 54030 of the **Federal Register** notice did not include all of the information contained in the ''Evaluation Criteria'' listed in the FFO. Therefore, in order to make the **Federal Register** notice announcing the 2006 Monkfish RSA Program consistent with the FFO for the Monkfish RSA Program, NMFS corrects the ''Evaluation Criteria'' contained in the September 13, 2005, **Federal Register** notice to read as follows:

1. *Importance and/or relevance and applicability of the proposed project:* This criterion ascertains whether there is intrinsic value in the proposed work and/or relevance to NOAA, Federal, regional, state, or local activities. For the 2006 Monkfish RSA Program, provide a clear definition of the problem, need, issue, or hypothesis to be addressed. The proposal should describe its relevance to RSA program priorities and

detail how the data gathered from the research will be used to enhance the understanding of the fishery resource or contribute to the body of information on which management decisions are made. If not directly related to priorities listed in this solicitation, provide justification why the proposed project should be considered. (25 points)

2. *Technical/scientific merit:* This criterion assesses whether the approach is technically sound and/or innovative, if the methods are appropriate, and whether there are clear project goals and objectives. Special emphasis will be given to proposals that foster and improve cooperative interactions with NMFS. A clear definition of the approach to be used including description of field work, theoretical studies, and laboratory analysis to support the proposed research, and the ability of the applicant to utilize all allocated research DAS during the 2006 fishing year in the area and time proposed is important. The time frame for utilizing research DAS and conducting the proposed research should be clearly specified. Activities that take place over a wider versus narrower geographical range, where appropriate, are preferred. (25 points)

3. *Overall qualifications of the project:* This criterion assesses whether the applicant, and team members, posses the necessary education, experience, training, facilities, and administrative resources to accomplish the project. This includes demonstration of support, cooperation and/or collaboration with the fishing industry, and qualifications/experience of project participants. Where appropriate, combined proposals involving multiple principal investigators are preferred versus separate stand-alone proposals on related projects. For proposals involving multiple vessels, special attention will be given to specification of safeguards to ensure that the authorized DAS set-aside will not be exceeded. (15 points)

4. *Project costs:* This criterion evaluates the budget to determine if it is realistic and commensurate with the project needs and time frame. Cost-effectiveness of the project is considered. The anticipated revenue from the DAS set-aside should be commensurate with estimated project costs, and generally should not exceed 2.5 times the cost of the associated research. Economic and budget projections should be quantified, to the extent possible. Where appropriate, use of existing equipment (fishing gear) is preferred versus acquisition of new equipment. (25 points)

5. *Outreach and education:* This criterion assesses whether the project involves a focused and effective education and outreach strategy regarding NOAA's mission to protect the Nation's natural resources. This includes identification of anticipated benefits, potential users, likelihood of success, and methods of disseminating results. Where appropriate, data generated from the research must be formatted in a manner consistent with NMFS and Atlantic Coastal Cooperative Statistics Program (ACCSP) databases. A copy of this format is available from NMFS. (10 points)

All other requirements for this solicitation remain the same.

**Classification**

*Paperwork Reduction Act (PRA)*

This document contains collection-of-information requirements subject to the PRA. The use of Standard Forms 424, 424A, 424B, SF-LLL, 269, 272, and CD–346 has been approved by the Office of Management and Budget (OMB) under the respective control numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, 0348–0039, 0348–0003, and 0605–0001. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

*Executive Order 12866*

This notice has been determined to be not significant for purposes of Executive Order 12866.

*Executive Order 13132 (Federalism)*

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

*Administrative Procedure Act/Regulatory Flexibility Act*

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act or any other law for rules concerning public property, loans, grants, benefits, and contracts (5 U.S.C. 553(a)(2)). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Therefore, a regulatory flexibility analysis has not been prepared.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: September 26, 2005.

**James W. Balsiger,**

*Acting Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 05–19501 Filed 9–28–05; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**[I.D. 091305B]**

### Endangered and Threatened Species; Take of Anadromous Fish

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Receipt of application for a scientific research/enhancement permit (1090) and request for comment.

**SUMMARY:** Notice is hereby given that NOAA Fisheries has received applications to grant permit to (Permit 1090), Mattole Salmon Group, Petrolia, CA. This permit would affect SONCC coho salmon (*Oncorhynchus kisutch*), California Coastal (CC) Chinook salmon (*O. tshawytscha*) and Northern California (NC) steelhead (*O. mykiss*) This document serves to notify the public of the availability of the permit application for review and comment before a final approval or disapproval is made by NMFS.

**DATES:** Written comments on the permit application must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Daylight Savings Time on October 31, 2005.

**ADDRESSES:** Written comments on any of these renewal and modification request should be sent to the appropriate office as indicated below. Comments may also be sent via fax to the number indicated for the request. Comments will not be accepted if submitted via e-mail or the internet. The applications and related documents are available for review in the indicated office, by appointment: For Permit 1090: Steve Liebhardt, Protected Species Division, NOAA Fisheries, 1655 Heindon Road, Arcata, CA 95521 (ph: 707–825–5186, fax 707 825–4840)

**FOR FURTHER INFORMATION CONTACT:** Steve Liebhardt at phone number (707–825–5186), or e-mail: *steve.liebhardt@noaa.gov*

**SUPPLEMENTARY INFORMATION:**

**Authority**

Issuance of permits, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543 (ESA), is based on a finding that such permits/modifications: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits are issued in accordance with and are subject to the ESA and NOAA Fisheries regulations governing listed fish and wildlife permits (50 CFR parts 222–226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NOAA Fisheries.

**Species Covered in This Notice**

This notice is relevant to the following threatened salmonid ESU: Southern Oregon/Northern California Coast (SONCC) coho salmon (*Oncorhynchus kisutch*), California Coastal (CC) Chinook salmon (*O. tshawytscha*) and Northern California (NC) steelhead (*O. mykiss*).

**Permit Requests Received**

*Permit 1090*

Mattole Salmon Group (MSG) has requested a Permit 1090 for take of juvenile SONCC coho salmon, CC Chinook salmon, and NC steelhead to monitor and support salmonid populations by using the following techniques: (1) Downstream migrant trapping, 2) downriver rescue and rearing, (3) upriver rescue and rearing, (4) adult trapping, (5) spawner surveys, and (6) direct underwater observations. MSG has requested non-lethal take of 16,250 juvenile SONCC coho salmon, 31,000 juvenile Chinook salmon, 105 adult Chinook salmon, and 76,250 juvenile steelhead. Up to 6,000 wild down-migrant Chinook salmon would be captured in the lower mainstem Mattole at river-mile 3.2 in MSG's 5' rotary-screw traps) for transfer to rearing ponds at MSG's adjacent Mill Creek rearing facility. Permit 1090 will expire August 1, 2010.

Dated: September 23, 2005.

**Angela Somma,**

*Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.*

[FR Doc. 05–19500 Filed 9–28–05; 8:45 am]

**BILLING CODE 3510–22–S**

## DEPARTMENT OF DEFENSE

**[OMB Control Number 0704–0246]**

## Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Government Property

**AGENCY:** Department of Defense (DoD).

**ACTION:** Notice and request for comments regarding a proposed extension of an approved information collection requirement.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through February 28, 2006. DoD proposes that OMB extend its approval for use through February 28, 2009.

**DATES:** DoD will consider all comments received by November 28, 2005.

**ADDRESSES:** You may submit comments, identified by OMB Control Number 0704–0246, using any of the following methods:

- Defense Acquisition Regulations Web site: *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm.* Follow the instructions for submitting comments.
- E-mail: *dfars@osd.mil.* Include OMB Control Number 0704–0246 in the subject line of the message.
- Fax: (703) 602–0350.
- Mail: Defense Acquisition Regulations Council, Attn: Mr. Mark Gomersall, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.
- Hand Delivery/Courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

All comments received will be posted to *http://emissary.acq.osd.mil/dar/dfars.nsf.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Mark Gomersall, (703) 602–0302. The information collection requirements addressed in this notice are available electronically via the Internet at: *http://www.acq.osd.mil/dpap/dars/dfars/index.htm.* Paper copies are available from Mr. Mark Gomersall, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

**SUPPLEMENTARY INFORMATION:**

*Title, Associated Forms, and OMB Number:* Defense Federal Acquisition Regulation Supplement (DFARS) Part 245, Government Property, and related clauses in DFARS Part 252; DD Form 1149, Requisition and Invoice/Shipping Document; DD Form 1342, Property Record; DD Form 1419, Industrial Plant Equipment Requisition; DD Form 1637, Notice of Acceptance of Inventory Schedules; DD Form 1639, Scrap Warranty; DD Form 1640, Request for Plant Clearance; and DD Form 1662, Property in the Custody of Contractors; OMB Control Number 0704–0246.

*Needs and Uses:* DoD needs this information to keep an account of Government property in the possession of contractors. Property administrators, contracting officers, and contractors use this information to maintain property records and material inspection, shipping, and receiving reports.

*Affected Public:* Businesses or other for-profit and not-for-profit institutions.

*Annual Burden Hours:* 50,170.

*Number of Respondents:* 14,862.

*Responses Per Respondent:* Approximately 3.

*Annual Responses:* 42,497.

*Average Burden Per Response:* 1.2 hours.

*Frequency:* On occasion.

**Summary of Information Collection**

This requirement provides for the collection of information related to providing Government property to contractors; contractor use and management of Government property; and reporting, redistribution, and disposal of contractor inventory. This information collection covers the requirements relating to DFARS Part 245 and related clauses and forms.

a. DFARS 245.302–1(b)(1)(A)*(1)* requires contractors to submit DD Form

1419 to the Defense Supply Center Richmond, before acquiring industrial plant equipment (IPE), to determine whether existing reallocable Government-owned facilities can be used.

b. DFARS 245.302–1(b)(1)(B) requires contractors to submit requests for proposed acquisition of automatic data processing equipment through the administrative contracting officer.

c. DFARS 245.405(1) requires contractors to obtain contracting officer approval before using Government production and research property on work for foreign governments or international organizations.

d. DFARS 245.407(a)(iv) requires contractors to submit requests for non-Government use of IPE to the contract administration office.

e. DFARS 245.505–5, 245.505–6, and 245.606–70 require contractors to use DD Form 1342 as a source document for establishing property records; to report information concerning IPE; and to list excess IPE.

f. DFARS 245.603–70(c) requires contractors that perform plant clearance duties to ensure that inventory schedules are satisfactory for storage or removal purposes. Contractors may use DD Form 1637 for this function.

g. DFARS 245.607–1(a)(i) permits contractors to request a pre-inventory scrap determination, made by the plant clearance officer after an on-site survey, if inventory is considered without value except for scrap.

h. DFARS 245.7101–2 permits contractors to use DD Form 1149 for transfer and donation of excess contractor inventory.

i. DFARS 245.7101–4 requires contractors to use DD Form 1640 to request plant clearance assistance or to transfer plant clearance.

j. DFARS 245.7303 and 245.7304 require contractors to use invitations for bid for the sale of surplus contractor inventory.

k. DFARS 245.7308(a) requires contractors to send certain information to the Department of Justice and the General Services Administration when the contractor sells or otherwise disposes of inventory with an estimated fair market value of $3 million or more, or disposes of any patents, processes, techniques or inventions, regardless of cost.

l. DFARS 245.7310–7 requires the purchaser of scrap to represent and warrant that the property will be used only as scrap. The purchaser also must sign DD Form 1639.

m. DFARS 252.245–7001 requires contractors to provide an annual report for contracts involving Government property in accordance with the requirements of DD Form 1662.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

[FR Doc. 05–19454 Filed 9–28–05; 8:45 am]

**BILLING CODE 5001–08–P**

## DEPARTMENT OF DEFENSE

**[OMB Control Number 0704–0397]**

### Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Requests for Equitable Adjustment

**AGENCY:** Department of Defense (DoD).

**ACTION:** Notice and request for comments regarding a proposed extension of an approved information collection requirement.

**SUMMARY:** In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), DoD announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. DoD invites comments on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of DoD, including whether the information will have practical utility; (b) the accuracy of the estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including the use of automated collection techniques or other forms of information technology. The Office of Management and Budget (OMB) has approved this information collection for use through February 28, 2006. DoD proposes that OMB extend its approval for use through February 28, 2009.

**DATES:** DoD will consider all comments received by November 28, 2005.

**ADDRESSES:** You may submit comments, identified by OMB Control Number 0704–0397, using any of the following methods:

- Defense Acquisition Regulations Web Site: *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm.* Follow the instructions for submitting comments.
- E-mail: *dfars@osd.mil.* Include OMB Control Number 0704–0397 in the subject line of the message.
- Fax: (703) 602–0350.
- Mail: Defense Acquisition Regulations Council, Attn: Ms. Deborah Tronic, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.
- Hand Delivery/Courier: Defense Acquisition Regulations Council, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

All comments received will be posted to *http://emissary.acq.osd.mil/dar/dfars.nsf.*

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah Tronic, (703) 602–0289. The information collection requirements addressed in this notice are available electronically via the Internet at: *http://www.acq.osd.mil/dpap/dars/dfars/index.htm.* Paper copies are available from Ms. Deborah Tronic, OUSD (AT&L) DPAP (DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

**SUPPLEMENTARY INFORMATION:**

*Title and OMB Number:* Contract Modifications—Defense Federal Acquisition Regulation Supplement (DFARS) Part 243 and associated clauses in DFARS 252.243; OMB Control Number 0704–0397.

*Needs and Uses:* The information collection required by the clause at DFARS 252.243–7002, Requests for Equitable Adjustment, implements 10 U.S.C. 2410(a). DoD contracting officers and auditors use this information to evaluate contractor requests for equitable adjustment to contract terms.

*Affected Public:* Businesses or other for-profit and not-for-profit institutions.

*Annual Burden Hours:* 2,120.

*Number of Respondents:* 440.

*Responses Per Respondent:* 1.

*Annual Responses:* 440.

*Average Burden Per Response:* 4.8 hours.

*Frequency:* On occasion.

**Summary of Information Collection**

The clause at DFARS 252.243–7002, Requests for Equitable Adjustment, requires contractors to certify that requests for equitable adjustment that exceed the simplified acquisition threshold are made in good faith and that the supporting data are accurate and complete. The clause also requires contractors to fully disclose all facts relevant to the requests for adjustment.

**Michele P. Peterson,**

*Editor, Defense Acquisition Regulations System.*

[FR Doc. 05–19459 Filed 9–28–05; 8:45 am]

**BILLING CODE 5001–08–P**

## DEPARTMENT OF EDUCATION

### Notice of Proposed Information Collection Requests

**AGENCY:** Department of Education.

**SUMMARY:** The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before November 28, 2005.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: September 22, 2005.

**Angela C. Arrington,**

*Leader, Information Management Case Services Team, Regulatory Information Management Services, Office of the Chief Information Officer.*

**Office of Postsecondary Education**

*Type of Review:* Extension.
*Title:* Final Reporting Forms for FIPSE International Consortia Programs.
*Frequency:* End of grant period.
*Affected Public:* Federal Government.
*Reporting and Recordkeeping Hour Burden:*
Responses: 35.
Burden Hours: 700.
*Abstract:* These are final reporting forms for FIPSE's three international competitions. These forms are used at the conclusion of the performance and budget periods for these three competitions: P116J, P116M and P116N.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 2885. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–245–6621. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–19485 Filed 9–28–05; 8:45 am]
**BILLING CODE 4000–01–P**

## DEPARTMENT OF EDUCATION

### A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education; Notice of Establishment

**AGENCY:** Office of the Secretary, Department of Education.

**ACTION:** Notice of establishment of A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education.

**SUMMARY:** The Secretary of Education announces her intention to establish A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education (Commission). The Federal Advisory Committee Act (Pub. L. 92–463 as amended; 5 U.S.C.A. Appendix 2) will govern the Commission.

*Purpose:* The Secretary has determined that the establishment of this Commission is necessary and in the public's interest. Today, higher education in the United States encompasses a wide array of educational opportunities and programs. Students attend institutions of higher education offering programs that range from baccalaureate and advanced degrees to occupational training of less than one year. The Higher Education Act of 1965, as amended, has benefited millions of students by making higher education more affordable as well as by ensuring its quality. As we look to the future, it is imperative that we maintain a system of higher education that meets the needs of our diverse population, and in particular the needs of traditionally underserved communities; provides enhanced opportunities for lifelong learning; and addresses the economic and workforce needs of the country.

In particular, the country is encountering a significant change to its economic structure, resulting in unmet workforce needs. This is particularly true with respect to highly skilled workers and in the fields of mathematics and science. The need is clear and unavoidable: only 68 out of 100 entering 9th graders graduate from high school on time. Yet, 80 percent of our fastest-growing jobs will require some higher education. As the need for highly skilled workers continues to grow, institutions of higher education must assess whether they are providing the necessary coursework and incentives that will enable American students to compete in the new global economy.

The purpose of this Commission is to consider how best to improve our system of higher education, to ensure that our graduates are well prepared to meet our future workforce needs and are able to participate fully in the changing economy. To accomplish this purpose, the Commission shall consider Federal, State, local, and institutional roles in higher education and analyze whether the current goals of higher education are appropriate and achievable. By August 1, 2006, the Commission will provide its written recommendations to the Secretary.

The Commission will be composed of no more than 20 representatives appointed by the Secretary from the

public and private sectors, as well as up to 5 ex officio members from the Department of Education and other Federal agencies. These representatives shall include former or current public and private college presidents, and may also include former elected officials, representatives of Fortune 500 corporations, the financial services industry, for-profit education companies, nonprofit education foundations, higher education researchers, and other such group representatives as the Secretary deems appropriate. As representatives, the members will speak for the groups of persons they represent, drawing on their personal experiences as members of these groups with respect to these issues.

**FOR FURTHER INFORMATION CONTACT:** Cheryl Oldham, Executive Director, A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: (202) 205–5233.

Dated: September 23, 2005.

**Margaret Spellings,**

*Secretary, Department of Education.*

[FR Doc. 05–19465 Filed 9–28–05; 8:45 am]

**BILLING CODE 4000–01–M**

## DEPARTMENT OF EDUCATION

### A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education

**AGENCY:** The Secretary of Education's Commission on the Future of Higher Education, Department of Education.

**ACTION:** Notice of meeting.

**SUMMARY:** This notice sets forth the schedule and proposed agenda of an upcoming meeting of A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education, (Commission). The notice also describes the functions of the Commission. Notice of this meeting is required by section 10(a)(2) of the Federal Advisory Committee Act (FACA) and is intended to notify the public of their opportunity to attend.

**DATES:** Monday, October 17, 2005.

*Time:* 9:30 a.m. to 3:30 p.m.

**ADDRESSES:** The Commission will meet in Washington, DC at the Washington Court Hotel on Capitol Hill, 525 New Jersey Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Cheryl Oldham, Executive Director, A National Dialogue: The Secretary of Education's Commission on the Future of Higher Education, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202. Telephone: (202) 205–5233.

**SUPPLEMENTARY INFORMATION:** The Commission is established by the Secretary of Education to begin a national dialogue about the future of higher education in this country. The purpose of the Commission is to consider how best to improve our system of higher education to ensure that our graduates are well prepared to meet our future workforce needs and are able to participate fully in the changing economy. The Commission shall consider Federal, State, local and institutional roles in higher education and analyze whether the current goals of higher education are appropriate and achievable. The Commission will also focus on the increasing tuition costs and the perception of many families, particularly low-income families, that higher education is inaccessible.

The agenda for this first meeting will include a welcome by Department officials followed by a roundtable discussion focusing on the strategies for accomplishing their mission as stated in their charter. A written report to the Secretary is due by August 1, 2006. The commissioners will also participate in an orientation and administrative briefings on FACA, Ethics issues, and Federal travel regulations.

Individuals who will need accommodations for a disability in order to attend the meeting (*e.g.,* interpreting services, assistive listening devices, or materials in alternative format) should notify Tracy Harris at (202) 260–3644 no later than October 7, 2005. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Individuals interested in attending the meeting must register in advance because of limited space issues. Please contact Tracy Harris at (202) 260–3644 or by e-mail at *Tracy. Harris@ed.gov.*

Opportunities for public comment will soon be available at the Commission's Web site which is being developed. Records are kept of all Commission proceedings and are available for public inspection at the staff office for the Commission from the hours of 9 a.m. to 5 p.m.

Dated: September 23, 2005.

**Margaret Spellings,**

*Secretary, U.S. Department of Education.*

[FR Doc. 05–19466 Filed 9–28–05; 8:45 am]

**BILLING CODE 4000–01–M**

## ENVIRONMENTAL PROTECTION AGENCY

**[FRL–7976–7]**

### Ward Transformer Superfund Site; Notice of Proposed Settlement

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of cost recovery settlement.

**SUMMARY:** Under section 122(h) (1) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Environmental Protection Agency has offered a cost recovery settlement at the Ward Transformer Superfund Site (Site) located in Raleigh, Wake County, North Carolina. EPA will consider public comments until October 31, 2005. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicated the proposed settlement is inappropriate, improper, or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Batchelor, U.S. Environmental Protection Agency, Region 4, Superfund Enforcement & Information Management Branch, Waste Management Division, 61 Forsyth Street, SW., Atlanta, Georgia 30303, (404) 562–8887, Email: *Batchelor.Paula@EPA.gov.*

Written or email comments may be submitted to Paula V. Batchelor at the above address within 30 days of the date of publication.

Dated: September 15, 2005.

**Rosalind H. Brown,**

*Chief, Superfund Enforcement & Information Management Branch, Waste Management Division.*

[FR Doc. 05–19494 Filed 9–28–05; 8:45 am]

**BILLING CODE 6560–50–P**

## FEDERAL ELECTION COMMISSION

### Sunshine Act Meeting

**PREVIOUSLY ANNOUNCED DATE AND TIME:** Thursday, September 29, 2005, 10 a.m. meeting open to the public. This meeting was cancelled.

**DATE AND TIME:** Tuesday, October 6, 2005 at 10 a.m.

**PLACE:** 999 E Street, NW., Washington, DC.

**STATUS:** This meeting will be closed to the public.

**ITEMS TO BE DISCUSSED:**

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.
Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.
(**Note:** The starting time for the open meeting on Thursday, October 6, 2005 has been changed to 2 p.m.)

**DATE AND TIME:** Thursday, October 6, 2005, at 2 p.m.

**PLACE:** 999 E Street, NW., Washington, DC (Ninth Floor).

**STATUS:** This meeting will be open to the public.

**ITEMS TO BE DISCUSSED:**

Correction and Approval of Minutes.
Report of the Audit Division on the Dole North Carolina Victory Committee, Inc.
Routine Administrative Matters.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Biersack, Press Officer, Telephone: (202) 694–1220.

**Mary W. Dove,**

*Secretary of the Commission.*

[FR Doc. 05–19638 Filed 9–27–05; 2:50 pm]

**BILLING CODE 6715–01–M**

## FEDERAL LABOR RELATIONS AUTHORITY

### Membership of the Federal Labor Relations Authority's Senior Executive Service Performance Review Board

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given of the members of the Performance Review Board.

**DATES:** September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Jill M. Crumpacker, Acting Executive Director, Federal Labor Relations Authority (FLRA); 1400 K Street, NW., Washington, DC 20424–0001; (202) 218–7945.

**SUPPLEMENTARY INFORMATION:** Section 4314(c) of Title 5, U.S.C. (as amended by the Civil Service Reform Act of 1978) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more Performance Review Boards (PRB). Section 4314(c)(4) requires that notice of appointment of the PRB be published in the **Federal Register**.

As required by 5 CFR 430.310, Chairman Dale Cabaniss has appointed the following executives to serve on the 2005–2006 PRB for the FLRA, beginning September 2005 through September 2006:

Frank Battle, Deputy Director of Administration, National Labor Relations Board; Jill Crumpacker, Acting Executive Director, Federal Labor Relations Authority;
Russell G. Harris, Deputy Administrator, Wage and Hour Division, U.S. Department of Labor;
Mary Johnson, General Counsel, National Mediation Board;
Steve Nelson, Director, Office of Policy and Evaluation, Merit Systems Protection Board;
Don Todd, Deputy Assistant Secretary, Office of Labor-Management Standards, U.S. Department of Labor.

**Authority:** 5 U.S.C. 4134(c)(4).

Dated: September 26, 2005.

**Jill M. Crumpacker,**

*Acting Executive Director.*

[FR Doc. 05–19487 Filed 9–28–05; 8:45 am]

**BILLING CODE 6727–01–P**

## FEDERAL RESERVE SYSTEM

### Proposed Agency Information Collection Activities; Comment Request

**AGENCY:** Board of Governors of the Federal Reserve System.

**SUMMARY:**

*Background*

On June 15, 1984, the Office of Management and Budget (OMB) delegated to the Board of Governors of the Federal Reserve System (Board) its approval authority under the Paperwork Reduction Act, as per 5 CFR 1320.16, to approve of and assign OMB control numbers to collection of information requests and requirements conducted or sponsored by the Board under conditions set forth in 5 CFR part 1320 Appendix A.1. Board-approved collections of information are incorporated into the official OMB inventory of currently approved collections of information. Copies of the OMB 83–Is and supporting statements and approved collection of information instruments are placed into OMB's public docket files. The Federal Reserve may not conduct or sponsor, and the respondent is not required to respond to, an information collection that has been extended, revised, or implemented on or after October 1, 1995, unless it displays a currently valid OMB control number.

*Request for Comment on Information Collection Proposals*

The following information collections, which are being handled under this delegated authority, have received initial Board approval and are hereby published for comment. At the end of the comment period, the proposed information collections, along with an analysis of comments and recommendations received, will be submitted to the Board for final approval under OMB delegated authority. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Federal Reserve's functions; including whether the information has practical utility;

b. The accuracy of the Federal Reserve's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

**DATES:** Comments must be submitted on or before November 28, 2005.

**ADDRESSES:** You may submit comments, identified by FR 2009, FR2028, FR 2572, or FR Y–10S by any of the following methods:

- Agency Web site: *http://www.federalreserve.gov*. Follow the instructions for submitting comments at *http://www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm*.
- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- E-mail: *regs.comments@federalreserve.gov*. Include docket number in the subject line of the message.
- FAX: 202–452–3819 or 202–452–3102.
- Mail: Jennifer J. Johnson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments are available from the Board's Web site at *www.federalreserve.gov/generalinfo/foia/ProposedRegs.cfm* as submitted, unless modified for technical reasons. Accordingly, your comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP–500 of the Board's Martin Building (20th and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

**FOR FURTHER INFORMATION CONTACT:** A copy of the proposed form and

instructions, the Paperwork Reduction Act Submission (OMB 83–I), supporting statement, and other documents that will be placed into OMB's public docket files once approved may be requested from the agency clearance officer, whose name appears below.

Michelle Long, Federal Reserve Board Clearance Officer (202–452–3829), Division of Research and Statistics, Board of Governors of the Federal Reserve System, Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202–263–4869), Board of Governors of the Federal Reserve System, Washington, DC 20551.

*Proposal to approve under OMB delegated authority the revision, without extension, of the following reports:*

*Report titles:* Report of Changes in Organizational Structure, Report of Changes in FBO Organizational Structure.

*Agency form numbers:* FR Y–10 and FR Y–10F.

*OMB control number:* 7100–0297.

*Frequency:* Event-generated.

*Reporters:* Bank holding companies (BHCs), foreign banking organizations (FBOs), and state member banks unaffiliated with a BHC.

*Annual reporting hours:* 18,004 hours.

*Estimated average hours per response:* 1 hour.

*Number of respondents:* 5,510.

*General description of report:* This information collection is mandatory (12 U.S.C. 248(a)(1), 602, 611a, 1843(k), 1844(c)(1)(A), 3106(a) and 12 CFR 211.13(c), 225.5(b), and 225.87). Individual respondent data are not considered as confidential. However, a company may request confidential treatment pursuant to sections (b)(4) and (b)(6) of the Freedom of Information Act (5 U.S.C. 522(b)(4) and (b)(6)).

*Abstract:* The FR Y–10 is an event-generated report filed by top-tier domestic BHCs, including financial holding companies (FHCs), and state member banks unaffiliated with a BHC or FHC, to capture changes in their regulated investments and activities. The Federal Reserve uses the data to monitor structure information on subsidiaries and regulated investments of these entities engaged in both banking and nonbanking activities.

The FR Y–10F is an event-generated report filed by FBOs, including FHCs, to capture changes in their regulated investments and activities. The Federal Reserve uses the data to ensure compliance with U.S. banking laws and regulations and to determine the risk profile of the FBO structure.

*Current action:* The Federal Reserve proposes to add a Supplement to the Reports of Changes in Organizational Structure (FR Y–10S) to enhance the Federal Reserve's ability to compare regulatory data to market data and to increase the Federal Reserve's effectiveness in assessing banking organizations' compliance with Sarbanes-Oxley Act of 2002 (SOX). The initial collection of this data would be as of December 31, 2005.

The FR Y–10S panel would comprise top-tier BHCs, FBOs, and state member banks that are not controlled by a BHC. All of these organizations currently file either the FR Y–10 or FR Y–10F. However, FBOs would not be required to report data for Schedule B.

**Schedule A—SEC Reporting Status**

As a general matter, the Federal Reserve's supervisory function assesses the effectiveness of a banking organization's systems and processes designed to ensure compliance with laws and regulations, including SOX. SOX contains detailed requirements designed to improve corporate governance, enhance financial disclosures, and reform auditing relationships for public companies, including public banking organizations. Public banking organizations are those bank holding companies and their subsidiaries that are required to file annual reports with the Securities and Exchange Commission (SEC) pursuant to section 13(a) or 15(d) of the Securities and Exchange Act of 1934. The Federal Reserve currently does not require banking organizations to report their SEC registration status, or a change in their status, on an annual or periodic basis. Data from Schedule A would allow the Federal Reserve to closely monitor banking organizations that must comply with SOX.

**Schedule B—Committee on Uniform Security Identification Procedures (CUSIP) number**

Over the last several years, the need to analyze regulatory data and market data jointly has increased for supervisory and economic research purposes. The Federal Reserve and other federal banking agencies are increasingly interested in the ability to perform this analysis. The market data could be used for risk classifications for deposit insurance pricing purposes and off-site surveillance models used to quantify the likelihood of downgrades in supervisory ratings.

To facilitate both supervisory analysis and economic research, there have been efforts to build databases linking Federal Reserve unique identifiers for institutions (ID RSSDs) to market identifiers such as CUSIP numbers and stock tickers. Although the market identifiers such as CUSIP numbers are publicly available, reconciling them to regulatory data has proven difficult and imprecise because so many institutions have similar attributes (such as entity names). Many who use these data have found it difficult and time consuming to perform this task and to keep the list up to date, particularly when there are mergers and acquisitions. Accurate and timely data are often needed to respond to Congressional and other inquiries. To assist in this reconciling, collection of six-digit CUSIP numbers on the FR Y–10S would provide a link between the ID RSSD identifiers and the market identifiers.

A CUSIP number identifies publicly-issued securities, including stocks of all registered U.S. and Canadian companies and U.S. government and municipal bonds. The number consists of nine characters (including letters and numbers) that uniquely identify a company or issuer and the type of security. The Federal Reserve proposes to require only the first six digits of the CUSIP number to reduce burden, and this number would still allow the Federal Reserve to uniquely identify the company. This item also would be completed by the respondent for certain of its subsidiaries that have these identifiers.

The CUSIP number may be used to link data from regulatory reports with other publicly available datasets that contain stock and bond returns, earnings forecasts, executive compensation, and the like. The Federal Reserve specifically requests comment on the benefits of making this information available to the public. An index matching the CUSIP number with the ID RSSD would allow investors, policy makers and academics to more fully examine issues ranging from bank-level economic performance to policy research on factors impacting systemic risk. Finally, as regulators increasingly rely on market discipline, the proposed change to link the regulatory and market data will assist in monitoring market activities.

*Proposal to approve under OMB delegated authority the extension for three years, with minor revision, of the following reports:*

1. *Report title:* Survey of Terms of Lending.

*Agency form number:* FR 2028A, FR 2028B, and FR 2028S.

*OMB control number:* 7100–0061.

*Frequency:* Quarterly.

*Reporters:* Commercial banks; and U.S. branches and agencies of foreign banks (FR 2028A and FR 2028S only).

*Annual reporting hours:* 7,317 hours.

*Estimated average hours per response:* FR 2028A, 3.7 hours; FR 2028B, 1.2 hours; and FR 2028S, 0.1 hours.

*Number of respondents:* FR 2028A, 398; FR 2028B, 250; and FR 2028S, 567.

*General description of report:* This information collection is voluntary (12 U.S.C. 248(a)(2)) and is given confidential treatment (5 U.S.C. 552(b)(4)).

*Abstract:* The Survey of Terms of Lending provides unique information concerning both price and certain nonprice terms of loans made to businesses and farmers during the first full business week of the mid-month of each quarter (February, May, August, and November). The survey comprises three reporting forms: The FR 2028A, Survey of Terms of Business Lending; the FR 2028B, Survey of Terms of Bank Lending to Farmers; and the FR 2028S, Prime Rate Supplement to the Survey of Terms of Lending. The FR 2028A and B collect detailed data on individual loans made during the survey week, and the FR 2028S collects the prime interest rate for each day of the survey from both FR 2028A and FR 2028B respondents. From these sample data, estimates of the terms of business loans and farm loans extended during the reporting week are constructed. The estimates for business loans are published in the quarterly E.2 release, Survey of Terms of Business Lending, while estimates for farm loans are published in the quarterly E.15 release, Agricultural Finance Databook.

*Current Actions:* The Federal Reserve proposes to revise the FR 2028A and FR 2028B by increasing to $3,000 the minimum size of loans reported. This revision would be implemented effective for the May 2006 survey week. No changes are proposed to the FR 2028S. The Federal Reserve would like to solicit specific comments on changing the minimum loan threshold from $1,000 to $3,000.

2. *Report title:* Report of Terms of Credit Card Plans.

*Agency form number:* FR 2572.

*OMB control number:* 7100–0239.

*Frequency:* Semi-annual.

*Reporters:* Commercial banks, savings banks, industrial banks, and savings and loans associations.

*Annual reporting hours:* 75 hours.

*Estimated average hours per response:* 0.25 hours.

*Number of respondents:* 150.

*General description of report:* This information collection is voluntary (15 U.S.C. 1646(b)) and is not given confidential treatment.

*Abstract:* This report collects data on credit card pricing and availability from a sample of at least 150 financial institutions that offer credit cards to the general public. The information is reported to the Congress and made available to the public in order to promote competition within the industry.

*Current Actions:* The Federal Reserve proposes two minor clarifications on the FR 2572 reporting form and instructions with regard to items 56 through 58, in which the fee amounts for cash advances, late payments, and exceeding the credit limit are reported. Clarification is needed to ensure that only one of two mutually exclusive responses is reported. Responses must diverge according to whether the particular fee is uniform or variable over the card plan's geographic area of availability.

*Discontinuation of the following report:*

*Report title:* Monthly Survey of Industrial Electricity Use.

*Agency form number:* FR 2009.

*OMB control number:* 7100–0057.

*Frequency:* Monthly.

*Reporters:* FR 2009a/c, Electric utility companies; and FR 2009b, cogenerators.

*Annual reporting hours:* FR 2009a/c, 1,920 hours; and FR 2009b, 900 hours.

*Estimated average hours per response:* FR 2009a/c, 1 hour; and FR 2009b, 30 minutes.

*Number of respondents:* FR 2009a/c, 160; and FR 2009b, 150.

*General description of report:* This information collection is voluntary (12 U.S.C. 225a, 263, 353 *et seq.,* and 461) and is given confidential treatment (5 U.S.C. 552(b)(4)).

*Abstract:* This voluntary survey collects information on the volume of electric power delivered during the month to classes of industrial customers. There are three versions of the survey: the FR 2009a and FR 2009c collect information from electric utilities, the FR 2009a in Standard Industrial Codes and the FR 2009c in North American Industry Classification System codes. The FR 2009b collects information from manufacturing and mining facilities that generate electric power for their own use. The electric power data are used in deriving the Federal Reserve's monthly index of industrial production as well as for calculating the monthly estimates of electric power used by industry.

*Current Actions:* The Federal Reserve proposes to discontinue the FR 2009. The reliability of the FR 2009 data has decreased in recent years due to industry consolidation that resulted from the deregulation of the electricity markets. Since 1997 the panel size has decreased by about 30 percent and the coverage of the panel in terms of the amount of electric power used by industry has also fallen about 30 percent. Consequently, the electric power data have become unacceptably volatile and have required a significant increase in resources to continue the use of these data in the construction of industrial production.

Board of Governors of the Federal Reserve System, September 22, 2005.

**Jennifer J. Johnson,**

*Secretary of the Board.*

[FR Doc. 05–19400 Filed 9–28–05; 8:45 am]

**BILLING CODE 6210–01–U**

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 24, 2005.

**A. Federal Reserve Bank of Philadelphia** (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105-1521:

*1. Penn Bancshares, Inc.*, Pennsville, New Jersey; to acquire 24.89 percent of

the voting shares of Harvest Community Bank, Pennsville, New Jersey.

**B. Federal Reserve Bank of Chicago** (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

*1. Integrity First Bancorporation, Inc.*,Wausau, Wisconsin; to become a bank holding company by acquiring 100 percent of the voting shares of Integrity First Bank, Wausau, Wisconsin (in organization).

**C. Federal Reserve Bank of Dallas** (W. Arthur Tribble, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

*1. Patriot Bancshares, Inc.* (currently named Quadco Bancshares, Inc.), Ladonia, Texas; to acquire 100 percent of the voting shares of Patriot Bank, Houston, Texas.

Board of Governors of the Federal Reserve System, September 26, 2005.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 05–19504 Filed 9–28–05; 8:45 am]

**BILLING CODE 6210–01–S**

## FEDERAL RESERVE SYSTEM

### Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than October 14, 2005.

**A. Federal Reserve Bank of Chicago** (Patrick M. Wilder, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

*1. Ogden Bancshares, Inc.*, Ames, Iowa; to engage *de novo* in extending credit and servicing loans, pursuant to section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, September 26, 2005.

**Robert deV. Frierson,**

*Deputy Secretary of the Board.*

[FR Doc. 05–19503 Filed 9–28–05; 8:45 am]

**BILLING CODE 6210–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the Secretary

**[Document Identifier: OS–0990–0294]**

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

*Type of Information Collection Request:* Revision of currently approved collection;

*Title of Information Collection:* Standards for Privacy of Individually Identifiable Health Information and Supporting Regulations at 45 CFR Parts 160 and 164.

*Form/OMB No.:* OS–0990–0294;

*Use:* 45 CFR Part 160 and 164 lay out the requirements regarding the privacy and utilization of patient medical records.

*Affected Public:* State, local or tribal governments, business or other for profit, individuals or households and not for profit institutions;

*Annual Number of Respondents:* 786,839;

*Total Annual Responses:* 776,224,162;

*Average Burden Per Response:* 30 minutes;

*Total Annual Hours:* 2,220,715;

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access the HHS Web site address at *http://www.hhs.gov/oirm/infocollect/pending/* or e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *naomi.cook@hhs.gov*, or call the Reports Clearance Office on (202) 690–8356. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the OS Paperwork Clearance Officer designated at the following address: Department of Health and Human Services, Office of the Secretary, Assistant Secretary for Budget, Technology, and Finance, Office of Information and Resource Management, Attention: Naomi Cook (0990–0294), Room 531–H, 200 Independence Avenue, SW., Washington, DC 20201.

Dated: September 19, 2005.

**Robert E. Polson,**

*Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.*

[FR Doc. 05–19425 Filed 9–28–05; 8:45 am]

**BILLING CODE 4153–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the National Coordinator; Announcement of the American Health Information Community Members

**ACTION:** Notice.

**SUMMARY:** This notice announces the selection of the American Health Information Community (the Community) members in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.)

The following individuals have been selected by the Secretary to serve on the American Health Information Community. From the private sector listed alphabetically: Craig R. Barrett, Chairman, Intel Corporation, Nancy Davenport-Ennis, CEO, National Patient Advocate Foundation, Lillee Smith Gelinas, R.N., Chief Nursing Officer, VHA Inc., Douglas E. Henley, M.D., Executive Vice President, American Academy of Family Physicians, Kevin D. Hutchinson, CEO, SureScripts,

Charles N. Kahn III, President, Federation of American Hospitals, Steven S. Reinemund, CEO and Chairman, PepsiCo, Scott P. Serota, President and CEO, Blue Cross Blue Shield Association. From the public sector listed alphabetically: Julie Louise Gerberding, M.D., Director Centers for Disease Control and Prevention, Mark B. McClellan, M.D. Administrator, Centers for Medicare and Medicaid Services, Michelle O'neill, Acting Under Secretary for Technology, Department of Commerce, Jonathan B. Perlin, M.D., Under Secretary for Health, Department of Veterans Affairs, E. Mitchell Roob, Secretary, Indiana Family and Social Services Administration, Linda M. Springer, Director, Office of Personnel Management, Mark J. Warshawsky, Assistant Secretary for Economic Policy, Department of the Treasury, William Winkenwerder Jr., M.D., Assistant Secretary of Defense, Department of Defense.

**FOR FURTHER INFORMATION CONTACT:** *http://www.hhs.gov/healthit.*

**SUPPLEMENTARY INFORMATION:** The American Health Information Community will advise the Secretary and recommend specific actions to achieve a common interoperability framework for health information technology (IT) and serve as a forum for participation from a broad range of stakeholders to provide input on achieving interoperability of health IT. The Community shall not exceed 17 voting members, including the Chair, and members shall be appointed by the Secretary.

Dated: September 23, 2005.

**Dana Haza,**

*Acting Director of the Office of Programs and Coordination, Office of the National Coordinator.*

[FR Doc. 05–19451 Filed 9–28–05; 8:45 am]

**BILLING CODE 4150–24–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Office of the National Coordinator; American Health Information Community Meeting

**ACTION:** Announcement of meeting.

**SUMMARY:** This notice announces the first meeting of the American Health Information Community in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.) The American Health Information Community will advise the Secretary and recommend specific actions to achieve a common interoperability framework for health information technology (IT).

**DATES:** October 7th, 2005 from 8:30 a.m. to 5 p.m.

**ADDRESSES:** Hubert H. Humphrey building (200 Independence Ave., Southwest, Washington, DC 20201), conference room 705A.

**FOR FURTHER INFORMATION CONTACT:** *http://www.hhs.gov/healthit.*

**SUPPLEMENTARY INFORMATION:**

In accordance with GSA regulations implementing the Federal Advisory Committee Act, ONC intends to publish a **Federal Register** meeting announcement at least 15 calendar days before the date of an American Health Information Community meeting for all dates in the future. The GSA regulations, however, also provide that an agency may give less than 15 days notice if the reasons for doing so are included in the **Federal Register** meeting notice. Due to the recent events in the gulf coast and the Department of Health and Human Services and Office of the National Coordinator's response to hurricane Katrina it has not been possible for ONC to announce the date and location of the first AHIC meeting before today. It should also be noted that the following meeting may be postponed if DHHS and ONC are involved in a response to hurricane Rita.

The URL for the webcast of the first AHIC meeting has not yet been established and will be announced on the ONC Web site *http://www.hhs.gov/healthit* before the scheduled date above.

Dated: September 23, 2005.

**Dana Haza,**

*Acting Director of the Office of Programs and Coordination, Office of the National Coordinator.*

[FR Doc. 05–19452 Filed 9–28–05; 8:45 am]

**BILLING CODE 4150–24–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

**[CMS–2230–FN]**

### State Children's Health Insurance Program (SCHIP); Redistribution of Unexpended SCHIP Funds From the Appropriation for Fiscal Year 2002

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Final notice.

**SUMMARY:** This final notice describes and finalizes the procedure, which was previously published in the **Federal Register** on January 19, 2005 (70 FR 3036) as a notice with comment period, for redistribution of States' unexpended Federal fiscal year (FY) 2002 SCHIP allotments remaining at the end of FY 2004 to those States that fully expended the allotments. These redistributed allotments will be available through the end of FY 2005 (September 30, 2005).

**DATES:** The provisions described in this final notice are effective on September 29, 2005.

**FOR FURTHER INFORMATION CONTACT:** Richard Strauss, (410) 786–2019.

**I. Background**

*A. Extension of Availability and Redistribution of SCHIP Fiscal Year 1998 Through 2001 Allotments*

Title XXI of the Social Security Act (the Act) sets forth the State Children's Health Insurance Program (SCHIP) to enable States, the District of Columbia, and specified Commonwealths and Territories to initiate and expand health insurance coverage to uninsured, low-income children. In this notice, unless otherwise indicated, the terms ''State'' and ''States'' refer to any or all of the 50 States, the District of Columbia, and the Commonwealths and Territories. States may implement the SCHIP through a separate child health program under title XXI of the Act, an expanded program under title XIX of the Act, or a combination of both.

Under section 2104(e) of the Act, the SCHIP allotments for a Federal fiscal year are available to match expenditures under an approved State child health plan for an initial 3-fiscal year ''period of availability,'' including the fiscal year for which the allotment was provided. After the initial period of availability, the amount of unspent allotments is reallotted and continues to be available during a subsequent period of availability, specified in SCHIP statute. With the exception described below for the allotments made in FYs 1998 through 2001, allotments that are unexpended at the end of the initial 3-year period of availability are redistributed from the States that did not fully spend the allotments to States that fully spent their allotments for that fiscal year.

The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA), enacted as part of Pub. L. 106–554 on December 21, 2000, amended title XXI of the Act in part by establishing requirements for a subsequent extended period of availability with respect to the amounts of States' FY 1998 and FY 1999 allotments that were unspent during the initial 3-year period of availability.

Under the BIPA amendments, the subsequent period of availability (after the initial 3-year period of availability) for States' unspent FY 1998 and 1999 allotments was extended to the end of FY 2002.

Section 1 of the Extension of Availability of SCHIP Allotments Act, Pub. L. 108–74, enacted on August 15, 2003, amended title XXI of the Act to establish further requirements for the subsequent period of availability associated with the unexpended amounts of States' FYs 1998, 1999, 2000, and 2001 allotments during the initial 3-year period of availability, or subsequent period of availability, relating to those fiscal years. Specifically, Pub. L. 108–74 amended section 2104(g) of the Act to extend the subsequent period of availability associated with the allotments and redistribution of allotments for FYs 1998 through 2000 through the end of fiscal year 2004. Pub. L. 108–74 also extended the subsequent period of availability for the redistributed and extended FY 2001 allotments through the end of fiscal year 2005.

As amended by Pub. L. 108–74, section 2104(g) of the Act prescribes a methodology and process that includes the retention of certain amounts of unspent FY 2000 and FY 2001 allotments that would remain available to the States that did not fully expend their FY 2000 or FY 2001 allotments (retained allotments), and the redistribution of unspent FY 2000 or FY 2001 allotments that would not be retained but which would be redistributed to those other States that fully spent their FY 2000 or FY 2001 allotments (redistributed allotments).

*B. Availability and Redistribution of SCHIP Fiscal Year 2002 Allotments*

Section 2104(e) of the Act provides that amounts allotted to a State shall remain available for expenditures by the State through the end of the second succeeding fiscal year, except that amounts reallotted to a State are available for expenditure by the State through the end of the fiscal year in which they are reallotted. Section 2104(f) of the Act requires the Secretary to ''determine an appropriate procedure for redistribution of allotments'' from States that have not expended their allotments for the fiscal year to States that have fully expended their allotments. Section 2104(g) of the Act, as added by BIPA and amended by Pub. L. 108–74, sets forth the process for reallotting unexpended amounts of SCHIP allotments for FY 1998 through FY 2001 (as well as for the extension of the period of time to expend allotments). Section 2104(g) of the Act does not address the treatment of States' unexpended SCHIP allotments for FY 2002 and the following fiscal years. Under sections 2104(e) and (f) of the Act, the Secretary is required to establish a procedure that provides for the treatment of States' unused SCHIP allotments for FY 2002 and following fiscal years. In particular, in applying section 2104(f) of the Act, following the initial 3-year period of availability referenced in section 2104(e) of the Act, the Secretary must determine an ''appropriate procedure for redistribution'' of the amounts of States'' FY 2002 SCHIP allotments from States that did not expend the allotments during the 3-year period of availability for that fiscal year (that is, FY 2002 through FY 2004) only to States that fully expended their FY 2002 allotments during the 3-year period of availability.

*C. Expenditures, Authority for Qualifying States To Use Available SCHIP Allotments for Medicaid Expenditures, and Ordering of Allotments Elections*

Under section 2105(a)(1)(A) through (D) and (a)(2) of the Act and before enactment of Pub. L. 108–74, only Federal payments for the following Medicaid and SCHIP expenditures were applied against States' available SCHIP allotments in the following order: (1) Medical assistance provided under title XIX (Medicaid) at the SCHIP enhanced Federal medical assistance percentage (FMAP) matching rate with respect to the States' Medicaid SCHIP expansion population; (2) medical assistance provided on behalf of a child during presumptive eligibility under section 1920A of the Act (these funds are matched at the regular Medicaid FMAP rate); (3) child health assistance to targeted low income children that meets minimum benefit requirements under SCHIP; and (4) certain expenditures in the SCHIP that are subject to the 10-Percent Limit on non-primary expenditures (including other child health assistance for targeted low-income children, health services initiatives, outreach, and administrative costs).

However, section 1(b) of Pub. L. 108'74, as amended by Pub. L. 108'127, added new section 2105(g) to the Act under which certain ''Qualifying States'' that met prescribed criteria may elect to use up to 20 percent of any of the States' available SCHIP allotments for FY 1998, 1999, 2000, or 2001 as additional Federal financial participation for expenditures under the State's Medicaid program, instead of expenditures under the State's SCHIP. As described in the **Federal Register** published on July 23, 2004 (69 FR 44013), if a Qualified State submits both 20 percent allowance expenditures and other ''regular'' SCHIP expenditures at the same time in a quarter, the 20 percent allowance expenditures will be applied first against the available fiscal year reallotments. However, the 20 percent allowance expenditures may be applied only against the specified available fiscal year allotment funds upon which the 20 percent allowances were based.

**II. Provisions of the Notice With Comment Period**

*A. Appropriate Procedure for Redistribution of Unexpended FY 2002 Allotments*

The notice with comment period, published in the **Federal Register** on January 19, 2005 (70 FR 3036), described our proposal for the appropriate procedure for redistribution of States' unexpended FY 2002 SCHIP allotments, as authorized and required under section 2104(f) of the Act.

Under section 2104(f) of the Act, the Secretary must determine an appropriate procedure to redistribute the entire amount of States' unexpended SCHIP allotments following the end of the related initial 3-year period of availability *only* to those States that fully expended the allotments by the end of the initial 3-year period of availability (referred to in this notice as the redistribution States). In determining the appropriate procedure for reallocating the unused FY 2002 allotments, our primary consideration was to address, to the greatest extent possible, any projected State shortfalls for each of the redistribution States that would occur in FY 2005, the fiscal year in which the FY 2002 redistribution would occur. We determined these State shortfalls in FY 2005 by considering for each redistribution State: (1) The projected SCHIP-related expenditures in FY 2005, as reflected in the State's November 15, 2004 quarterly budget submission (Forms CMS–37 and/or CMS–21B); and (2) the total SCHIP allotments available in FY 2005 for the State, *exclusive* of any FY 2002 redistribution. For a redistribution State whose FY 2005 projected SCHIP-related expenditures are greater than its total SCHIP allotments available in FY 2005, the difference between the amounts under (1) and (2) for a State represents that State's ''shortfall'' for FY 2005.

In the procedure for redistributing the unexpended FY 2002 allotments described in the January 19, 2005 **Federal Register** notice (70 FR 3036),

only after accounting for the FY 2005 shortfall amounts of the Redistribution States did we further redistribute any remaining unexpended FY 2002 allotments to the Redistribution States. For purposes of consistency with previous fiscal year redistribution methodologies, we based the redistribution of the *remaining* unexpended FY 2002 allotments (that is, only after first accounting for the total shortfalls for each Redistribution State) on the same redistribution methodology as set forth in the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA, Pub. L. 106–554, enacted on December 21, 2000) amending section 2104(g)(1) of the Act. Specifically, we allocated the remaining amounts of the unexpended FY 2002 allotments based on the difference between each of the Redistribution States' total SCHIP-related expenditures for the 3-year period of availability related to FY 2002 (that is, FY 2002 through FY 2004) and the State's FY 2002 allotment. The allocation basis is the percentage determined by dividing this difference for each Redistribution State (including those Redistribution States with a FY 2005 shortfall) by the total of those differences for all Redistribution States.

## III. Analysis and Responses to Comments on the Notice With Comment Period

We received three comments with respect to the January 19, 2005 **Federal Register** notice, two from States, and one from an organization representing American Indian/Alaska Natives for substance abuse services. The following describes the comments and provides our responses.

*Comment:* One comment from a State Office of Health and Human Services agreed with the methodology used to determine the FY 2002 redistribution amounts, but requested that they be recalculated based on updated information. In particular, the commenter indicated that the use of the expenditure projections for FY 2005 from the State's November 15, 2004 submission to the Centers for Medicare & Medicaid Services did not adequately reflect its actual expenditures for FY 2005. In that regard, the State requested that the FY 2002 redistribution amounts be recalculated based on revised reporting of the State's expenditures projections that more accurately represented the State's expenditures for FY 2005.

*Response:* We agree with the commenter and, in this notice, have recalculated the States' FY 2002 redistribution amounts using States' updated expenditure projections for FY 2005 from the States' August 15, 2005 submissions to CMS of Forms CMS–37 and CMS–21B. As indicated in the January 19, 2005 **Federal Register** notice, our primary consideration is to address, to the greatest extent possible, any projected State shortfalls for each of the Redistribution States that would occur in FY 2005, the fiscal year in which the FY 2002 redistribution occurs. Accordingly, we believe using the States' most recent expenditure projections for FY 2005, contained in their August 2005 submissions, will provide the best reflection of this information.

*Comment:* One comment received from an organization representing American Indian/Alaska Natives for substance abuse services provided a number of significant observations regarding the SCHIP program with respect to tribal issues. In particular, the commenter recommended that the FY 2002 SCHIP redistribution should not be redistributed without first consulting tribes and tribal governments, and also suggested that the Secretary has discretion to require each State to have meaningful consultation with tribal governments and to develop a plan for spending the redistributions.

*Response:* The commenter discussed significant issues relating to tribal concerns; however, those comments and the related suggestions made are outside the scope of the notice with comment period. In particular, the comment did not address the procedure for calculating the redistribution of the unexpended FY 2002 allotments. Furthermore, with respect to the commenter's suggestion that the FY 2002 redistribution should not occur without giving the tribes an opportunity for consultation, we believe the public comment period with respect to the January 19, 2005 **Federal Register** notice provided that opportunity. Therefore, we have not revised the procedure for redistribution of States' unexpended FY 2002 allotments with respect to this comment.

*Comment:* The third comment, from a State Department of Health and Human Services, commended CMS for addressing the objectives of the program and strongly supported the basic procedure for calculating the FY 2002 redistribution amounts in addressing the objectives of the SCHIP as described in the January 19, 2005 **Federal Register** notice.

*Response:* We appreciate the support expressed by the commenter. As indicated in our response to the first comment above, in this final notice, we are retaining the same procedure for calculating the States' FY 2002 redistribution amounts methodology as described in the January 19, 2005 **Federal Register** notice with comment period. Again, the only revision we are making to this procedure, in accordance with our stated objective of addressing States' needs to the greatest extent possible, is to base the calculation of the FY 2002 redistribution amounts on the States' updated FY 2005 expenditure projections as contained in States' August 2005 submissions to CMS.

## IV. Provisions of the Final Notice

The only change we are making in this final notice, from the January 19, 2005 **Federal Register** notice with comment period, is to recalculate States' FY 2002 redistribution amounts using States' updated expenditure projections for FY 2005 as provided in their August 15, 2005 submissions to CMS of Forms CMS–37 and CMS–21B. Otherwise, the procedure for calculating States' FY 2002 redistribution amounts is exactly the same as described in the January 19, 2005 **Federal Register** notice with comment period. We believe using the updated FY 2005 expenditure projections most appropriately reflects the States' needs in funding their SCHIP programs.

## V. Final FY 2002 Redistribution Amounts

### *A. Unexpended FY 2002 Allotments*

In Table 1 of this final notice, we set forth the shortfall calculation for the 50 States and the District of Columbia. In Table 2 of this final notice, we set forth the amount of States' unexpended FY 2002 allotments as reflected by the States' expenditure submissions through November 30, 2004. These amounts are used in determining the States' FY 2002 redistribution amounts. We established the amount of States' unexpended FY 2002 allotments at the end of the initial 3-year period of availability based on the SCHIP-related expenditures, as reported and certified by States to us on the quarterly expenditure reports (Form CMS–64 and/or Form CMS–21) by November 30, 2004. These expenditures are applied and tracked against the States' FY 2002 allotments (as published in the **Federal Register** on October 26, 2001 (66 FR 54246), and on November 13, 2001 (correction notice (66 FR 56902)), and other available allotments, on Form CMS–21C, Allocation of the Title XIX and Title XXI Expenditures to SCHIP Fiscal Year Allotment.

By November 30, 2004, all States reported and certified their FY 2004 fourth quarter expenditures (representing the last quarter of the 3-

year period of availability for FY 2002). Expenditures reflected in Table 2 below were taken from our Medicaid Budget and Expenditure System/State Children's Health Program Budget and Expenditure System (MBES/CBES) ''masterfile,'' which represents the State's official certified SCHIP and Medicaid expenditure reporting system records related to FY 2002 allotments. Based on States' expenditure reports submitted and certified through November 30, 2004, the total amount of States' FY 2002 SCHIP allotments that were unexpended at the end of the 3-year period ending September 30, 2004, is $642,617,724.

*B. FY 2002 Redistribution Amounts for the Commonwealths and Territories*

Section 2104(g)(1)(A)(ii) of the Act specifies the methodology for determining the FY *1998* through FY *2001* redistributed allotments for the Commonwealths and Territories that fully expended their SCHIP allotments related to those fiscal years. We applied the same methodology for purposes of determining an appropriate procedure under section 2104(f) of the Act to redistribute the unexpended FY *2002* allotments remaining at the end of FY 2004. Under this procedure, the total FY 2002 allotment amount available for redistribution to the Commonwealths and Territories is determined by multiplying the total amount of the unexpended FY 2002 allotments available for redistribution nationally by 1.05 percent. For the FY 2002 redistribution calculation, this amount is $6,747,486 (1.05 percent of $642,617,724). Only those Commonwealths and Territories that have fully expended their FY 2002 allotments will receive an allocation of this amount, equal to a specified percentage of the 1.05 percent amount; with respect to the FY 2002 allotments, all 5 Commonwealths and Territories fully expended those allotments by the end of FY 2004. This specified percentage is the amount determined by dividing the respective SCHIP FY 2002 allotment for each Commonwealth or Territory (that has fully expended its FY 2002 allotment) by the total of all the FY 2002 allotments for those Commonwealths and Territories that fully expended their FY 2002 allotments.

*C. FY 2002 Redistribution Amounts for the States and the District of Columbia*

Section 2104(f) of the Act requires the Secretary to determine an appropriate procedure for calculating the redistribution amounts for each of those States and the District of Columbia that have fully expended their allotments; this final notice sets forth the procedure for the redistribution of the unexpended FY 2002 allotments. The attached tables and table descriptions provide detailed information on how the FY 2002 reallotment amounts are calculated. Generally, the FY 2002 redistribution amounts for the 50 States and the District of Columbia were determined as follows:

First, the total amount available for FY 2002 redistribution nationally was established by determining the total amount of unexpended FY 2002 allotments remaining at the end of FY 2004, as reported by the States through November 30, 2004.

Second, the total amount available for the FY 2002 redistribution to the States and the District of Columbia (not including the Commonwealths and Territories) was determined by subtracting the total of the FY 2002 redistribution amounts for the Commonwealths and Territories from the total available nationally for redistribution.

Third, the allocation of this total amount available for redistribution to the States and District of Columbia is determined by determining the ''shortfall'' amounts (if any) for these redistribution States that would occur in FY 2005, the fiscal year in which the unexpended FY 2002 allotments are actually redistributed. The FY 2005 shortfall amount, described previously, was determined as the excess (if any) of the FY 2002 redistribution States' projected FY 2005 expenditures (taken from the States' August 15, 2005 budget quarterly budget report submissions) over those States' total SCHIP allotments available in FY 2005 (not including any potential FY 2002 redistribution amounts). In this regard, the total available allotments in FY 2005 include the following: any remaining FY 2001 reallotments carried over from FY 2004 into FY 2005, any remaining 2003 allotments carried over from FY 2004 into FY 2005, any remaining 2004 allotments carried over from FY 2004 into FY 2005, and the FY 2005 allotments (available beginning with FY 2005).

Fourth, the amount of any unexpended FY 2002 allotments remaining after determining and accounting for the shortfall amounts was multiplied by a percentage specific to each FY 2002 Redistribution State. This percentage was determined for each FY 2002 Redistribution State by dividing the difference between that State's total reported applicable expenditures for the FY 2002 3-year period of availability and the State's FY 2002 allotment related to that period of availability, by the total of these differences for all Redistribution States.

*D. Tables for Calculating the SCHIP FY 2002 Redistributed Allotments*

The following is a description of Table 1 and Table 2, which present the calculation of each Redistribution State's FY 2002 SCHIP redistribution amount.

A total of $3,115,200,000 was allotted nationally for FY 2002, representing $3,082,125,000 in allotments to the 50 States and the District of Columbia, and $33,075,000 in allotments to the Commonwealths and Territories. Based on the quarterly expenditure reports, submitted and certified by November 30, 2003, 28 States fully expended their FY 2002 allotments, 23 States and the District of Columbia did not fully expend their FY 2002 allotments, and all 5 of the Commonwealths and Territories fully expended their FY 2002 allotments. For the States and the District of Columbia that did not fully expend their FY 2002 allotments, their total FY 2002 allotments were $1,413,648,379 and the total expenditures applied against their FY 2002 allotments were $771,030,655. Therefore, the total amount of unexpended FY 2002 allotments at the end of FY 2004 equaled $642,617,724 ($1,413,648,379 minus $771,030,655). As discussed in the January 19, 2005 **Federal Register** notice with comment period, no maintenance of effort (MOE) reductions were necessary with respect to the FY 2002 allotments. Therefore, the total amount of the FY 2002 allotments unexpended at the end of FY 2004 equaled $642,617,724 ($642,617,724 plus $0 related to the MOE provision).

In accordance with the redistribution calculation for FY 2002 described above, $6,747,486 is redistributed to the five Commonwealths and Territories, and $635,870,238 redistributed to the 28 Redistribution States. The total $642,617,724 in FY 2002 redistributed allotment amounts will remain available to these States through the end of FY 2005.

*Key to Table 1—FY 2005 Shortfall Calculation*

Table 1 presents the FY 2005 shortfall calculation for the 50 States and the District of Columbia.

Column/Description

Column A = *State.* Name of State, District of Columbia, the Commonwealth or Territory. This is the only column in Table 1 that includes Commonwealths and Territories; the

shortfall calculation in Table 1 is not applicable to the Commonwealths and Territories.

Column B = *FY 2001 Retained/ Redistributed Allotments Carried Over From FY 2004.* This column contains the amounts of States' FY 2001 redistributed or retained allotments carried over from FY 2004 and available in FY 2005.

Column C = *FY 2003 Allotments Carried Over From FY 2004.* This column contains the amounts of States' FY 2003 allotments carried over from FY 2004 and available in FY 2005.

Column D = *FY 2004 Allotments Carried Over From FY 2004.* This column contains the amounts of States' FY 2004 allotments carried over from FY 2004 and available in FY 2005.

Column E = *FY 2005 Allotments Initially Available Beginning FY 2005.* This column contains the FY 2005 SCHIP allotments, which are initially available in FY 2005, and were published in the **Federal Register** on August 27, 2004 (69 FR 52700).

Column F = *Total Available Allotments In FY 2005 Not Including FY 2002 Redistribution.* This column contains the States' total allotment amounts (not including any FY 2002 redistribution amounts) available in FY 2005. This amount is the sum of Columns B through E.

Column G = *Projected Expenditures FY 2005.* This column contains the amounts of States' projected FY 2005 SCHIP and SCHIP-related expenditures as contained in the States' August 15, 2005 quarterly budget submission.

Column H = *Projected FY 2005 Shortfall Not Including FY 2002 Redistribution.* This column contains the States' projected FY 2005 shortfall amounts, calculated as Column G minus Column F.

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| | TABLE 1 - FY 2005 SHORTFALL CALCULATION | | | | | | |
|---|---|---|---|---|---|---|---|
| State | FY 2001 Retained/ Redistributed Allotments Carried Over From FY 2004 | FY 2003 Allotments Carried Over From FY 2004 | FY 2004 Allotments Carried Over From FY 2004 | FY 2005 Allotments Initially Available Beginning FY 2005 | Total Available Allotments In FY 2005 Not Including FY 2002 Redistribution Col B + C + D + E | Projected Expenditures FY 2005 From Aug. 05 Estimates* | Projected FY 2005 Shortfall Not Including FY 2002 Redistribution Col G - F |
| A | B | C | D | E | F | G | H |
| Alabama | $0 | $38,780,591 | $54,679,333 | $68,041,101 | $161,501,025 | $85,800,000 | NO Shortfall |
| Alaska | $13,106,151 | $7,430,455 | $7,156,891 | $9,020,449 | $36,713,946 | $17,119,000 | NO Shortfall |
| Arizona | $0 | $0 | $20,451,690 | $106,473,496 | $126,925,186 | $194,784,000 | $67,858,814 |
| Arkansas | $26,978,616 | $34,154,500 | $35,073,372 | $48,661,587 | $144,868,075 | $30,851,000 | NO Shortfall |
| California | $0 | $548,807,933 | $533,990,797 | $667,443,669 | $1,750,242,399 | $721,210,000 | NO Shortfall |
| Colorado | $0 | $37,914,522 | $44,865,429 | $57,951,287 | $140,731,238 | $45,448,000 | NO Shortfall |
| Connecticut | $2,534,685 | $24,361,434 | $27,975,129 | $36,560,595 | $91,431,843 | $20,939,000 | NO Shortfall |
| Delaware | $2,073,663 | $8,686,068 | $7,817,461 | $9,045,920 | $27,623,112 | $6,086,000 | NO Shortfall |
| District of Columbia | $0 | $7,201,920 | $7,198,952 | $9,635,097 | $24,035,969 | $8,014,000 | NO Shortfall |
| Florida | $132,618,160 | $35,421,360 | $193,614,837 | $249,246,758 | $610,901,115 | $390,435,000 | NO Shortfall |
| Georgia | $24,823,484 | $0 | $103,892,954 | $130,915,014 | $259,631,452 | $203,621,000 | NO Shortfall |
| Hawaii | $0 | $9,647,963 | $9,647,963 | $12,404,524 | $31,700,450 | $14,017,000 | NO Shortfall |
| Idaho | $0 | $16,795,479 | $16,958,002 | $20,747,545 | $54,501,026 | $19,854,000 | NO Shortfall |
| Illinois | $0 | $59,196,232 | $120,969,643 | $164,935,925 | $345,101,800 | $285,846,000 | NO Shortfall |
| Indiana | $14,570,905 | $53,709,869 | $54,026,680 | $73,421,543 | $195,728,997 | $95,508,000 | NO Shortfall |
| Iowa | $0 | $8,644,989 | $19,703,423 | $28,266,206 | $56,614,618 | $43,067,000 | NO Shortfall |
| Kansas | $14,982,065 | $20,083,084 | $23,541,920 | $28,479,189 | $87,086,258 | $43,523,000 | NO Shortfall |
| Kentucky | $33,743,149 | $37,984,461 | $39,286,749 | $54,060,786 | $165,075,145 | $78,498,000 | NO Shortfall |
| Louisiana | $0 | $44,240,933 | $64,523,178 | $77,477,697 | $186,241,808 | $132,844,000 | NO Shortfall |
| Maine | $8,706,125 | $9,688,881 | $9,474,540 | $12,462,201 | $40,331,747 | $23,203,000 | NO Shortfall |
| Maryland | $65,648,887 | $33,648,564 | $36,121,348 | $48,348,957 | $183,767,756 | $123,986,000 | NO Shortfall |
| Massachusetts | $27,707,902 | $46,201,047 | $46,201,047 | $59,401,346 | $179,511,342 | $102,659,000 | NO Shortfall |
| Michigan | $0 | $86,568,091 | $89,138,280 | $111,345,557 | $287,051,928 | $171,113,000 | NO Shortfall |
| Minnesota | $0 | $0 | $25,164,277 | $38,614,589 | $63,778,866 | $82,709,000 | $18,930,134 |
| Mississippi | $13,604,712 | $0 | $36,897,326 | $48,165,511 | $98,667,549 | $116,006,000 | $17,338,451 |
| Missouri | $0 | $20,239,122 | $41,923,481 | $53,958,180 | $116,120,783 | $91,512,000 | NO Shortfall |
| Montana | $0 | $10,005,270 | $10,193,881 | $12,284,292 | $32,483,443 | $14,517,000 | NO Shortfall |
| Nebraska | $0 | $0 | $12,482,163 | $17,096,147 | $29,578,310 | $31,283,000 | $1,704,690 |
| Nevada | $0 | $30,436,463 | $31,163,957 | $40,387,249 | $101,987,669 | $26,982,000 | NO Shortfall |
| New Hampshire | $3,143,900 | $8,903,739 | $8,013,366 | $9,272,609 | $29,333,614 | $7,411,000 | NO Shortfall |
| New Jersey | $0 | $0 | $25,767,757 | $84,735,099 | $110,502,856 | $216,497,000 | $105,994,144 |
| New Mexico | $25,383,498 | $32,788,606 | $32,788,606 | $42,156,779 | $133,117,489 | $20,113,000 | NO Shortfall |
| New York | $164,030,940 | $227,517,050 | $216,455,790 | $270,142,080 | $878,145,860 | $467,912,000 | NO Shortfall |
| North Carolina | $40,464,013 | $67,513,855 | $85,753,907 | $110,255,024 | $303,986,799 | $210,104,000 | NO Shortfall |
| North Dakota | $0 | $5,436,695 | $5,436,695 | $6,384,719 | $17,258,109 | $11,000,000 | NO Shortfall |
| Ohio | $0 | $60,480,850 | $103,803,316 | $125,842,184 | $290,126,350 | $174,181,000 | NO Shortfall |
| Oklahoma | $0 | $44,621,756 | $44,621,756 | $57,370,830 | $146,614,342 | $59,881,000 | NO Shortfall |
| Oregon | $1,399,872 | $40,708,703 | $38,056,795 | $47,255,380 | $127,420,750 | $41,996,000 | NO Shortfall |
| Pennsylvania* | $0 | $92,759,160 | $98,747,809 | $130,963,777 | $322,470,746 | $153,422,000 | NO Shortfall |
| Rhode Island | $223,963 | $0 | $0 | $9,354,646 | $9,578,609 | $51,459,000 | $41,880,391 |
| South Carolina | $0 | $43,402,180 | $43,355,057 | $54,306,115 | $141,063,352 | $60,050,000 | NO Shortfall |
| South Dakota | $0 | $4,405,884 | $5,790,144 | $7,886,854 | $18,082,882 | $14,316,000 | NO Shortfall |
| Tennessee | $43,148,411 | $58,354,512 | $57,957,983 | $78,904,574 | $238,365,480 | $2,916,000 | NO Shortfall |
| Texas | $0 | $311,503,988 | $330,851,514 | $449,972,119 | $1,092,327,621 | $297,903,000 | NO Shortfall |
| Utah | $0 | $24,693,700 | $24,091,106 | $31,699,161 | $80,483,967 | $30,145,000 | NO Shortfall |
| Vermont | $0 | $3,813,156 | $3,813,156 | $4,902,630 | $12,528,942 | $4,475,000 | NO Shortfall |
| Virginia | $0 | $53,437,771 | $55,714,814 | $76,254,851 | $185,407,436 | $80,398,000 | NO Shortfall |
| Washington | $25,419,765 | $50,326,484 | $50,326,484 | $64,705,479 | $190,778,212 | $31,553,000 | NO Shortfall |
| West Virginia | $12,081,320 | $15,641,332 | $18,760,354 | $24,422,724 | $70,905,730 | $34,793,000 | NO Shortfall |
| Wisconsin | $36,731,734 | $0 | $43,504,958 | $51,870,414 | $132,107,106 | $85,445,000 | NO Shortfall |
| Wyoming | $0 | $5,480,750 | $4,952,110 | $6,364,535 | $16,797,395 | $5,706,000 | NO Shortfall |
| TOTAL STATES ONLY | $733,125,920 | $2,381,639,402 | $3,022,698,180 | $4,039,875,000 | $10,177,338,502 | $5,283,110,000 | $253,706,624 |
| | | | | | | | |
| COMMONWEALTHS AND TERRITORIES | | | | | | | |
| Puerto Rico | NA | NA | NA | NA | NA | NA | NA |
| Guam | NA | NA | NA | NA | NA | NA | NA |
| Virgin Islands | NA | NA | NA | NA | NA | NA | NA |
| American Samoa | NA | NA | NA | NA | NA | NA | NA |
| N. Mariana Islands | NA | NA | NA | NA | NA | NA | NA |
| TOTAL | NA | NA | NA | NA | NA | NA | NA |
| | | | | | | | |
| NATIONAL TOTAL | $733,125,920 | $2,381,639,402 | $3,022,698,180 | $4,039,875,000 | $10,177,338,502 | $5,283,110,000 | $253,706,624 |

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*Key to Table 2—Calculation of the Schip Redistribution of the Unexpended Allotments for Fiscal Year: 2002*

Table 2 Contains the calculation of States' FY 2002 redistribution.

Column/Description

Column A = *State*. Name of State, District of Columbia, the Commonwealth or Territory.

Column B = *FY 2002 Allotment*. This column contains the FY 2002 SCHIP allotments for all States, which were published in the **Federal Register** on October 26, 2001 (66 FR 54246) and in the correction notice on November 13, 2001 (66 FR 56902).

Column C = *Expenditures Applied Against FY 2002 Allotment*. This column contains the cumulative expenditures applied against the FY 2002 allotments, as reported and certified by all States through November 30, 2004.

Column D = *Unexpended FY 2002 Allotments Or ''Redistribution.''* This column contains the amounts of unexpended FY 2002 SCHIP allotments for States that did not fully expend the allotments during the 3-year period of availability for FY 2002 (FYs 2002 through 2004), and is equal to the difference between the amounts in Column B and Column C. For States that did fully expend their FY 2002 allotments during the period of availability, the entry in this column is ''REDISTRIBUTION.'' The MOE amount is added to the total of the amounts of the States' unexpended FY 2002 allotments in this column at the bottom of Column D. However, since the MOE is $0, $642,617,724 represents the total amount available for the FY 2002 redistribution ($642,617,724, the total unexpended FY 2002 allotments, plus $0, the MOE provision amount).

Column E = *Projected FY 2005 Shortfall*. This column contains the projected ''shortfall'' amounts for the redistribution States, taken from Column H, Table 1. If there is no projected shortfall for the Redistribution State, the entry in this column is ''NO Shortfall.'' If the State is not a Redistribution State, the entry in this column is ''NA.'' For the Commonwealths and Territories, the entry in Column E is ''NA.''

Column F = *For Redistribution States Only FY 2002—FY 2004 Expenditures*. For the Redistribution States only (States that have fully expended their FY 2002 allotments), this column contains the total amounts of those States' reported SCHIP/SCHIP-related expenditures for the years FY 2002 through FY 2004, representing the FY 2002 3-year period of availability. For those States, Commonwealths, and Territories that did not fully expend their FY 2002 allotments during the period of availability, the entry in Column F is ''NA.''

Column G = *Redistribution States Only FY 02–04 Expenditures Minus FY 02 Allotment*. This column contains the amounts of Redistribution States' reported SCHIP/SCHIP-related expenditures for each of the years FY 2002 through FY 2004 minus the FY 2002 allotment, calculated as the entry in Column F minus the entry in Column B.

Column H = *For Redistribution States Percent Of Total Redistribution*. This column contains each Redistribution State's redistribution percentage of the total amount available for redistribution, calculated as the entry in Column G divided by the total (for Redistribution States only, and exclusive of the Commonwealths and Territories) of Column G.

Column I = *FY 2002 Redistributed Allotment Amounts.* This column contains the amounts of States' unexpended FY 2002 SCHIP allotments that are being redistributed to the Redistribution States in addition to any shortfall amounts being provided to those States. The amount in Column I is calculated as the percentage for each redistribution State in Column H multiplied by the total additional amount available for redistribution. For the 28 States that have fully expended their FY 2002 allotments, the total additional FY 2002 redistribution is $382,163,614. For the Commonwealths and Territories that have fully expended their FY 2002 allotments, the amounts in Column I represent their respective proportionate shares (allocated based on their FY 2002 allotments) of the total amount available for redistribution to the Commonwealths and Territories, $6,747,486 (representing 1.05 percent of the total amount for redistribution of $642,617,724). For those States and the District of Columbia that did not fully expend their FY 2002 allotments during the 3-year period of availability, the entry in Column I is ''NA.''

Column J = *FY 2005 Shortfall Amount.* This column contains the shortfall amounts for the Redistribution States; the amounts in this column are the same as the entries in Column E. The total shortfall amount is $253,706,624.

Column K = *Total FY 2002 Redistribution Including FY 2005 Shortfall.* For the Redistribution States, this column reflects the total FY 2002 redistribution calculated as the sum of Column I and Column J. For the States and the District of Columbia, the total FY 2002 redistribution amount in FY 2005 is $635,870,238. For the Commonwealths and Territories, the total FY 2002 redistribution amount in FY 2005 is $6,747,486. The total FY 2002 redistribution amount available nationally is $642,617,724.

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TABLE 2 - CALCULATION OF THE REDISTRIBUTION OF THE UNEXPENDED SCHIP ALLOTMENTS FOR FISCAL YEAR: 2002

| | |
|---|---|
| Total Unexpended FY 2002 Allotments (not including MOE): | $642,617,724 |
| FY 2002 MOE Amount: | $0 |
| Total Unexpended FY 2002 Allotments (including MOE) /1: | $642,617,724 |
| Total Needed for Redistribution for Territories /2: | $6,747,486 |
| Total Needed for SHORTFALL /3: | $253,706,624 |
| Total (Territory Redistribution + SHORTFALL): | $260,454,110 |
| Total Available for Redistribution to States /4: | $382,163,614 |

| State | CALCULATION OF UNEXPENDED FY 2002 ALLOTMENTS | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | FY 2002 Allotment | Expenditures Applied Against FY 2002 Allotment | Unexpended FY 2002 Allotments or "REDISTRIBUTION" | Projected FY 2005 Shortfall | For Redistribution States Only FY 2002 - FY 2004 Expenditures | Redistribution States Only FY 02-04 Expenditures Minus FY 02 Allotment (Col F - B) | For Redistribution States Percent of Total Redistribution (Col G/Sum of Col G) | FY 2002 Redistributed Allotment Amounts (Col H x Amount Available for Redistribution) | FY 2005 Shortfall Amounts (Col E) | Total FY 2002 Redistribution Including FY 2005 Shortfall (Col I + J) |
| A | B | C | D | E | F | G | H | I | J | K |
| Alabama | $48,585,422 | $48,585,422 | REDISTRIBUTION | NO Shortfall | $199,134,354 | $150,548,932 | 2.2559% | $8,621,243 | NO Shortfall | $8,621,244 |
| Alaska | $6,968,138 | $6,968,138 | REDISTRIBUTION | NO Shortfall | $64,407,563 | $57,439,425 | 0.8607% | $3,289,291 | NO Shortfall | $3,289,291 |
| Arizona | $87,166,211 | $87,166,211 | REDISTRIBUTION | $67,858,814 | $572,329,176 | $485,162,965 | 7.2699% | $27,783,047 | $67,858,814 | $95,641,861 |
| Arkansas | $36,291,812 | $0 | $36,291,812 | na | NA | NA | NA | NA | na | $0 |
| California | $528,446,560 | $405,981,074 | $122,465,486 | na | NA | NA | NA | NA | na | $0 |
| Colorado | $34,266,951 | $28,302,704 | $5,964,247 | na | NA | NA | NA | NA | na | $0 |
| Connecticut | $25,993,944 | $0 | $25,993,944 | na | NA | NA | NA | NA | na | $0 |
| Delaware | $8,520,205 | $0 | $8,520,205 | na | NA | NA | NA | NA | na | $0 |
| District of Columbia | $7,849,329 | $1,916,909 | $5,932,420 | na | NA | NA | NA | NA | na | $0 |
| Florida | $164,157,649 | $164,157,649 | REDISTRIBUTION | NO Shortfall | $804,219,732 | $640,062,083 | 9.5910% | $36,653,406 | NO Shortfall | $36,653,406 |
| Georgia | $104,986,194 | $104,986,194 | REDISTRIBUTION | NO Shortfall | $500,526,957 | $395,540,763 | 5.9270% | $22,650,797 | NO Shortfall | $22,650,797 |
| Hawaii | $9,483,732 | $4,598,741 | $4,864,991 | na | NA | NA | NA | NA | na | $0 |
| Idaho | $16,800,022 | $8,768,455 | $8,031,567 | na | NA | NA | NA | NA | na | $0 |
| Illinois | $127,220,093 | $127,220,093 | REDISTRIBUTION | NO Shortfall | $405,450,939 | $278,230,846 | 4.1692% | $15,932,998 | NO Shortfall | $15,932,998 |
| Indiana | $47,030,390 | $0 | $47,030,390 | na | NA | NA | NA | NA | na | $0 |
| Iowa | $22,411,236 | $22,411,236 | REDISTRIBUTION | NO Shortfall | $98,883,470 | $76,472,234 | 1.1459% | $4,379,212 | NO Shortfall | $4,379,212 |
| Kansas | $21,978,619 | $21,978,619 | REDISTRIBUTION | NO Shortfall | $112,416,518 | $90,437,899 | 1.3552% | $5,178,962 | NO Shortfall | $5,178,962 |
| Kentucky | $38,435,891 | $38,435,891 | REDISTRIBUTION | NO Shortfall | $212,808,301 | $174,172,410 | 2.6099% | $9,974,051 | NO Shortfall | $9,974,051 |
| Louisiana | $57,691,885 | $57,691,885 | REDISTRIBUTION | NO Shortfall | $237,884,772 | $180,192,887 | 2.7001% | $10,318,816 | NO Shortfall | $10,318,816 |
| Maine | $9,994,099 | $9,994,099 | REDISTRIBUTION | NO Shortfall | $64,101,148 | $54,107,049 | 0.8108% | $3,098,461 | NO Shortfall | $3,098,461 |
| Maryland | $33,927,307 | $33,927,307 | REDISTRIBUTION | NO Shortfall | $363,324,885 | $329,397,578 | 4.9359% | $18,863,081 | NO Shortfall | $18,863,081 |
| Massachusetts | $45,318,822 | $45,318,822 | REDISTRIBUTION | NO Shortfall | $250,641,972 | $205,323,150 | 3.0767% | $11,757,910 | NO Shortfall | $11,757,911 |
| Michigan | $96,893,382 | $96,893,382 | REDISTRIBUTION | NO Shortfall | $259,858,138 | $162,964,756 | 2.4419% | $9,332,240 | NO Shortfall | $9,332,241 |
| Minnesota | $30,041,680 | $30,041,680 | REDISTRIBUTION | $18,930,134 | $201,863,946 | $171,822,266 | 2.5717% | $9,828,016 | $18,930,134 | $28,758,150 |
| Mississippi | $37,917,154 | $37,917,154 | REDISTRIBUTION | $17,338,451 | $260,297,137 | $222,379,983 | 3.3323% | $12,734,677 | $17,338,451 | $30,073,128 |
| Missouri | $45,918,455 | $45,918,455 | REDISTRIBUTION | NO Shortfall | $213,982,032 | $168,063,577 | 2.5184% | $9,624,226 | NO Shortfall | $9,624,226 |
| Montana | $10,932,695 | $10,932,695 | REDISTRIBUTION | NO Shortfall | $38,461,187 | $27,528,492 | 0.4125% | $1,576,430 | NO Shortfall | $1,576,430 |
| Nebraska | $14,161,451 | $14,161,451 | REDISTRIBUTION | $1,704,690 | $72,003,489 | $57,842,038 | 0.8667% | $3,312,347 | $1,704,690 | $5,017,037 |
| Nevada | $27,813,689 | $10,758,689 | $16,855,000 | na | NA | NA | NA | NA | na | $0 |
| New Hampshire | $9,091,578 | $0 | $9,091,578 | na | NA | NA | NA | NA | na | $0 |
| New Jersey | $69,478,513 | $69,478,513 | REDISTRIBUTION | $105,994,144 | $737,019,513 | $667,541,000 | 10.0028% | $38,226,996 | $105,994,144 | $144,221,140 |
| New Mexico | $33,494,942 | $0 | $33,494,942 | na | NA | NA | NA | NA | na | $0 |
| New York | $233,993,235 | $233,993,235 | REDISTRIBUTION | NO Shortfall | $1,020,662,967 | $786,669,732 | 11.7879% | $45,048,950 | NO Shortfall | $45,048,950 |
| North Carolina | $81,129,294 | $81,129,294 | REDISTRIBUTION | NO Shortfall | $382,983,381 | $301,854,087 | 4.5231% | $17,285,792 | NO Shortfall | $17,285,792 |
| North Dakota | $5,332,879 | $5,181,951 | $150,928 | na | NA | NA | NA | NA | na | $0 |
| Ohio | $108,125,285 | $108,125,285 | REDISTRIBUTION | NO Shortfall | $434,668,938 | $326,543,653 | 4.8931% | $18,699,650 | NO Shortfall | $18,699,650 |
| Oklahoma | $45,583,004 | $7,463,767 | $38,119,237 | na | NA | NA | NA | NA | na | $0 |
| Oregon | $37,597,497 | $0 | $37,597,497 | na | NA | NA | NA | NA | na | $0 |
| Pennsylvania | $101,603,820 | $101,603,820 | REDISTRIBUTION | NO Shortfall | $350,930,277 | $249,326,457 | 3.7360% | $14,277,777 | NO Shortfall | $14,277,777 |
| Rhode Island | $7,473,463 | $7,473,463 | REDISTRIBUTION | $41,880,391 | $98,375,316 | $90,901,853 | 1.3621% | $5,205,530 | $41,880,391 | $47,085,921 |
| South Carolina | $47,303,777 | $40,906,239 | $6,397,538 | na | NA | NA | NA | NA | na | $0 |
| South Dakota | $5,941,727 | $5,941,727 | REDISTRIBUTION | NO Shortfall | $28,647,971 | $22,706,244 | 0.3402% | $1,300,282 | NO Shortfall | $1,300,282 |
| Tennessee | $61,964,136 | $0 | $61,964,136 | na | NA | NA | NA | NA | na | $0 |
| Texas | $301,839,575 | $197,200,669 | $104,638,906 | na | NA | NA | NA | NA | na | $0 |
| Utah | $23,017,975 | $22,259,242 | $758,733 | na | NA | NA | NA | NA | na | $0 |
| Vermont | $3,740,343 | $1,898,563 | $1,841,780 | na | NA | NA | NA | NA | na | $0 |
| Virginia | $54,662,752 | $35,249,201 | $19,413,551 | na | NA | NA | NA | NA | na | $0 |
| Washington | $42,446,166 | $0 | $42,446,166 | na | NA | NA | NA | NA | na | $0 |
| West Virginia | $16,650,270 | $16,650,270 | REDISTRIBUTION | NO Shortfall | $84,674,650 | $68,024,380 | 1.0193% | $3,895,443 | NO Shortfall | $3,895,443 |
| Wisconsin | $39,374,631 | $39,374,631 | REDISTRIBUTION | NO Shortfall | $271,870,736 | $232,496,105 | 3.4838% | $13,313,980 | NO Shortfall | $13,313,980 |
| Wyoming | $5,297,121 | $544,451 | $4,752,670 | na | NA | NA | NA | NA | na | $0 |
| TOTAL STATES ONLY | $3,082,125,000 | $2,439,507,276 | $642,617,724 | $253,706,624 | $8,342,029,465 | $6,673,552,844 | 100.0000% | $382,163,614 | $253,706,624 | $635,870,238 |
| | | | | | | | | | | |
| COMMONWEALTHS AND TERRITORIES | | | | | | | | | | |
| Puerto Rico | $30,296,700 | $30,296,700 | REDISTRIBUTION | NA | NA | NA | NA | $6,180,697 | NA | $6,180,697 |
| Guam | $1,157,625 | $1,157,625 | REDISTRIBUTION | NA | NA | NA | NA | $236,162 | NA | $236,162 |
| Virgin Islands | $859,950 | $859,950 | REDISTRIBUTION | NA | NA | NA | NA | $175,435 | NA | $175,435 |
| American Samoa | $396,900 | $396,900 | REDISTRIBUTION | NA | NA | NA | NA | $80,970 | NA | $80,970 |
| N. Mariana Islands | $363,825 | $363,825 | REDISTRIBUTION | NA | NA | NA | NA | $74,222 | NA | $74,222 |
| TOTAL | $33,075,000 | $33,075,000 | $0 | NA | NA | NA | $0 | $6,747,486 | NA | $6,747,486 |
| | | | | | | | | (Totals to "1.05%" Amount) | | |
| NATIONAL TOTAL | $3,115,200,000 | $2,472,582,276 | $642,617,724 | $253,706,624 | | | | $388,911,100 | $253,706,624 | $642,617,724 |
| FY 2002 MOE AMOUNT | | - | | | | | | | | Total FY 2002 |
| TOTAL WITH MOE AMOUNT | $3,115,200,000 | $2,472,582,276 | $642,617,724 | | | | | | | Redistributed Allotments |

Footnotes:
/1 The total unexpended FY 2002 allotments are $642,617,724, calculated as $642,617,724 (the total unexpended FY 2002 allotments, not including the maintenance of effort (MOE) amount) plus $0,000 (the MOE amount)
/2 $6,747,486 is the total amount needed for redistribution to the commonwealths and territories, calculated as 1.05 percent of $642,617,724 (the total unexpended FY 2002 allotments, including the MOE amount)
/3 $253,706,624 is the total needed for SHORTFALL
/4 $382,163,614 is the total redistribution to the states (excluding the SHORTFALL), calculated as $642,617,724 (total unexpended FY 2002 allotments including the MOE amount) reduced by $253,706,624 (the total FY 2002 SHORTFALL) and $6,747,486 (total jurisdiction redistribution)

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## VI. Regulatory Impact Statement

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980 Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). We have determined that this final notice is not a major rule. The States' FY 2002 SCHIP allotments, totaling $3,115,200,000 were originally published in a notice in the **Federal Register** (66 FR 54246) and allotted to States in FY 2002. This final notice does not revise the amount of the 2002 allotment originally made available to the States, but rather, sets forth the procedure for redistributing those FY 2002 allotments, which were unexpended at the end of FY 2004 (the end of the 3-year period of availability referenced in section 2104(e) of the Act), and announces the amount of the FY 2002 allotments to be redistributed to the redistribution States and the availability of the unexpended FY 2002 allotment amounts to the end of 2005. Because participation in the SCHIP program on the part of States is voluntary, any payments and expenditures States make or incur on behalf of the program that are not reimbursed by the Federal Government are made voluntarily.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this final notice will not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Core-Based Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this final notice will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately $120 million. This final notice will not create an unfunded mandate on States, tribal, or local governments. Therefore, we are not required to perform an assessment of the costs and benefits of this notice.

Executive Order 13132 establishes certain requirements that an agency must meet when it publishes a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this final notice and have determined that it does not significantly affect States' rights, roles, and responsibilities.

Low-income children will benefit from payments under this program through increased opportunities for health insurance coverage. We believe this final notice will have an overall positive impact by informing States, the District of Columbia, and Commonwealths and Territories of the extent to which they are permitted to expend funds under their child health plans using the FY 2002 allotment's redistribution amounts.

In accordance with the provisions of Executive Order 12866, this final notice was reviewed by the Office of Management and Budget.

## VII. Waiver of Delay in Effective Date

We ordinarily provide a 30-day delay in the effective date of the provisions of a rule in accordance with the Administrative Procedure Act (APA) (5 U.S.C. 553 (d)). However, we can waive the 30-day delay in effective date if the Secretary finds, for good cause, that such delay is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons in the rule issued. 5 U.S.C. 553(d)(3).

The provisions of this final notice need to be effective before September 30, 2005, the end of FY 2005, because with respect to the redistribution of unused allotments under section 2104(e) of the Act, ''amounts reallotted to a State under subsection (f) [on redistribution of unused allotments] shall be available for expenditure by the State through the end of the fiscal year in which they are reallotted.'' Because CMS needed to receive and analyze the States' expenditure estimates as contained in the States' August 15, 2005 submissions, it was impracticable to publish this final notice earlier. Furthermore, we believe that the most up-to-date expenditure projections for FY 2005 from the States' August 2005 budget submissions best reflect the needs of the States in FY 2005. In order to redistribute the FY 2002 allotments by the end of FY 2005 (that is, by September 30, 2005) based on the most recent FY 2005 estimates, this final notice needs to be effective before the end of September 2005, which requires a waiver of the 30-day delay in the effective date. We believe it is contrary to the public interest not to waive the 30-day delay in effective date. Therefore, on the basis that it would be impracticable and contrary to the public interest, we find that good cause exists to waive the requirement for a 30-day delay in the effective date.

**Authority:** (Section 1102 of the Social Security Act (42 U.S.C. 1302) (Catalog of Federal Domestic Assistance Program No. 93.767, State Children's Health Insurance Program))

Dated: September 15, 2005.

**Mark B. McClellan,**

*Administrator, Centers for Medicare & Medicaid Services.*

Dated: September 26, 2005.

**Michael O. Leavitt,**

*Secretary.*

[FR Doc. 05–19481 Filed 9–26–05; 2:34 pm]

BILLING CODE 4120–01–P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2005N–0389]**

### Agency Information Collection Activities; Proposed Collection; Comment Request; Reprocessed Single-Use Device Labeling

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on reprocessed single-use device labeling.

**DATES:** Submit written or electronic comments on the collection of information by November 28, 2005.

**ADDRESSES:** Submit electronic comments on the collection of information to *http://www.fda.gov/dockets/ecomments*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Reprocessed Single-Use Device Labeling (21 U.S.C. 352(u))**

Section 502 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 352), among other things, establishes requirements that the label or labeling of a medical device must meet so that it is not misbranded and subject to regulatory action. The Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Public Law 107–250) amended section 502 of the act to add section 502(u) to require devices (both new and reprocessed) to bear prominently and conspicuously the name of the manufacturer, a generally recognized abbreviation of such name, or a unique and generally recognized symbol identifying the manufacturer. Section 2(c) of The Medical Device User Fee Stabilization Act of 2005 (MDUFSA) (Public Law 109–43) amends section 502(u) of the act by limiting the provision to reprocessed single-use devices (SUDs) and the manufacturers who reprocess them. Under the amended provision, if the original SUD or an attachment to it prominently and conspicuously bears the name of the manufacturer, then the reprocessor of the SUD is required to identify itself by name, abbreviation, or symbol, in a prominent and conspicuous manner on the device or attachment to the device. If the original SUD does not prominently and conspicuously bear the name of the manufacturer, the manufacturer who reprocesses the SUD for reuse may identify itself using a detachable label that is intended to be affixed to the patient record. MDUFSA was enacted on August 1, 2005, and becomes self-implementing on August 1, 2006.

The requirements of section 502(u) of the act impose a minimal burden on industry. This section of the act only requires the manufacturer, packer, or distributor of a device to include their name and address on the labeling of a device. This information is readily available to the establishment and easily supplied. From its registration and premarket submission database, FDA estimates that there are 3 establishments that distribute approximately 300 reprocessed SUDs. Each response is anticipated to take 0.1 hours resulting in a total burden to industry of 30 hours.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

| Section of the act | No. of Respondents | Annual Responses Per Respondent | Total Annual Responses | Hours per Response | Total Hours |
|---|---|---|---|---|---|
| 502(u) | 3 | 100 | 300 | 0.1 | 30 |

[1]There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: September 22, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–19509 Filed 9–28–05; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

**[Docket No. 2003N–0161] (formerly Docket No. 03N–0161)**

### Medical Devices; Reprocessed Single-Use Devices; Termination of Exemptions From Premarket Notification; Requirement for Submission of Validation Data

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is adding noncompression heart stabilizers to the list of critical reprocessed single-use devices (SUDs) whose exemption from premarket notification requirements has been terminated and for which validation data, as specified under the Medical Device User Fee and Modernization Act of 2002 (MDUFMA), are necessary in a premarket notification (510(k)). The agency is also adding laparoscopic and endoscopic electrosurgical accessories to the list of reprocessed SUDs currently subject to premarket notification requirements that will now require submission of supplemental validation data. FDA is requiring submission of these data to ensure that reprocessed single-use noncompression heart stabilizers and laparoscopic and endoscopic electrosurgical accessories are substantially equivalent to predicate devices, in accordance with MDUFMA.

**DATES:** These actions are effective September 29, 2005. Manufacturers of reprocessed single-use noncompression heart stabilizers must submit 510(k)s for these devices by December 29, 2006, or their devices may no longer be legally marketed. Manufacturers of reprocessed single-use laparoscopic and endoscopic electrosurgical accessories who already have 510(k) clearance for these devices must submit supplemental validation data for the devices by June 29, 2006, or their devices may no longer be legally marketed.

**ADDRESSES:** Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Comments should be identified with the docket number found in brackets in the heading of this document.

**FOR FURTHER INFORMATION CONTACT:** Barbara A. Zimmerman, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–8320, ext. 158.

**SUPPLEMENTARY INFORMATION:**

## I. Background

On October 26, 2002, MDUFMA (Public Law 107–250), amended the Federal Food, Drug, and Cosmetic Act (the act) by adding section 510(o) (21 U.S.C. 360(o)), which provided new regulatory requirements for reprocessed SUDs. According to this new provision, in order to ensure that reprocessed SUDs are substantially equivalent to predicate devices, 510(k)s for certain reprocessed SUDs identified by FDA must include validation data. These required validation data include cleaning and sterilization data, and functional performance data demonstrating that each SUD will remain substantially equivalent to its predicate device after the maximum number of times the device is reprocessed as intended by the person submitting the premarket notification.

Before enactment of the new law, a manufacturer of a reprocessed SUD was required to obtain premarket approval or premarket clearance for the device, unless the device was exempt from premarket submission requirements. Under MDUFMA, some previously exempt reprocessed SUDs are no longer exempt from premarket notification requirements. Manufacturers of these identified devices were required to submit 510(k)s that included validation data specified by FDA. Reprocessors of certain SUDs already subject to cleared 510(k)s were also required to submit the validation data specified by the agency.

The reprocessed SUDs subject to these new requirements were listed in the **Federal Register** as required by MDUFMA. In accordance with section 510(o) of the act, FDA shall revise the lists as appropriate. This notice adds two types of reprocessed SUDs to the lists of devices subject to MDUFMA's data submission requirements. Noncompression heart stabilizers are being added to the list of previously exempt reprocessed SUDs that now require the submission of 510(k)s containing validation data. Laparoscopic and endoscopic electrosurgical accessories are being added to the list of reprocessed SUDs, already subject to premarket notification requirements, for which supplemental validation data are required.

### *A. Definitions*

Under section 302(b) of MDUFMA, a reprocessed SUD is defined as an ''original device that has previously been used on a patient and has been subjected to additional processing and manufacturing for the purpose of an additional single use on a patient. The subsequent processing and manufacture of a reprocessed single-use device shall result in a device that is reprocessed within the meaning of this definition.''

Reprocessed SUDs are divided into three groups: (1) critical, (2) semicritical, and (3) noncritical. The first two categories reflect definitions set forth in MDUFMA, and all three reflect a classification scheme recognized in the industry.[1] These categories of devices are defined as follows:

(1) *A critical reprocessed SUD* is intended to contact normally sterile tissue or body spaces during use.

(2) *A semicritical reprocessed SUD* is intended to contact intact mucous membranes and not penetrate normally sterile areas of the body.

(3) *A noncritical reprocessed SUD* is intended to make topical contact and not penetrate intact skin.

### *B. Critical and Semicritical Reprocessed SUDs Previously Exempt From Premarket Notification*

MDUFMA required FDA to review the critical and semicritical reprocessed SUDs that were previously exempt from premarket notification requirements and determine which of these devices required premarket notification to ensure their substantial equivalence to predicate devices. By April 26, 2003, FDA was required to identify in a **Federal Register** notice those critical reprocessed SUDs whose exemption from premarket notification would be terminated and for which FDA determined that validation data, as specified under MDUFMA, was necessary in a 510(k). According to the law, manufacturers of the devices whose exemptions from premarket notification were terminated were required to submit 510(k)s that included validation data regarding cleaning, sterilization, and functional performance, in addition to all the other required elements of a 510(k) identified in § 807.87 (21 CFR 807.87), within 15 months of

[1]Spaulding, E.H., ''The Role of Chemical Disinfection in the Prevention of Nonsocomial Infections,'' P.S. Brachman and T.C. Eickof (ed), Proceedings of International Conference on Nonsocomial Infections, 1970, American Hospital Association, Chicago, 254-274, 1971.

publication of the notice or no longer market their devices.

In accordance with section 510(o) of the act, FDA must revise the list of devices subject to this requirement as appropriate. On June 26, 2003 (68 FR 38071), FDA recategorized nine device types from semicritical to critical, and added nonelectric gastroenterology-urology biopsy forceps to the list of critical devices whose exemption from premarket notification requirements was being terminated.

By April 26, 2004, FDA was required to identify in a **Federal Register** notice those semicritical reprocessed SUDs whose exemption from premarket notification would be terminated and for which FDA determined that validation data, as specified under MDUFMA, was necessary in a 510(k). As discussed above, manufacturers of the devices whose exemptions from premarket notification were terminated were required to submit 510(k)s that included validation data regarding cleaning, sterilization, and functional performance, in addition to all the other required elements of a 510(k) identified in § 807.87, within 15 months of publication of the notice or no longer market their devices. In accordance with section 510(o) of the act, FDA must revise the list of devices subject to this requirement as appropriate.

*C. Reprocessed SUDs Already Subject to Premarket Notification Requirements*

MDUFMA also required FDA to review the types of reprocessed SUDs already subject to premarket notification requirements and to identify which of these devices required the submission of validation data to ensure their substantial equivalence to predicate devices. FDA published a list of these devices in the **Federal Register** on April 30, 2003 (68 FR 23139). As described above, FDA must revise the list of devices subject to this requirement as appropriate.

For devices identified on this list that had already been cleared through the 510(k) process, manufacturers were required to submit validation data regarding cleaning, sterilization, and functional performance within 9 months of publication of the list or no longer market their devices.

For devices on this list that were not yet cleared through the 510(k) process, manufacturers were required to submit 510(k)s including validation data regarding cleaning, sterilization, and functional performance, in addition to all the other required elements identified in 21 CFR 807.87, in order to market these devices.

## II. FDA's Implementation of New Section 510(o) of the Act

In the **Federal Register** of April 30, 2003 (68 FR 23139), FDA described the methodology and criteria used to identify the reprocessed SUDs that were included in the lists required by MDUFMA. First, FDA described how it identified the types of SUDs currently being reprocessed and how the Spaulding definitions (see footnote 1) were used to categorize these devices as critical, semicritical, or noncritical. (See Attachment 1.) Next, the agency described its use of the Risk Prioritization Scheme (RPS)[2] that was used to evaluate the potential risk (high, moderate, or low) associated with an SUD based on the following factors: (1) Risk of infection and (2) risk of inadequate performance following reprocessing. FDA identified its final criterion as those reprocessed SUDs intended to come in contact with tissue at high risk of being infected with the causative agents of Creutzfeldt-Jakob Disease (CJD). (These are generally devices intended for use in neurosurgery and ophthalmology.)

Using this methodology and these criteria, the devices included on List I (Critical and Semicritical Reprocessed SUDs Previously Exempt from Premarket Notification Requirements that Now Require 510(k)s with Validation Data) of the April 30, 2003, June 26, 2003, and April 13, 2004, **Federal Register** notices are those critical and semicritical reprocessed SUDs that were either high risk according to the RPS or intended to come in contact with tissue at high risk of being infected with CJD. The devices included on List II (Reprocessed SUDs Subject to Premarket Notification Requirements that Now Require the Submission of Validation Data) of the April 30, 2003, **Federal Register** notice are those reprocessed SUDs already subject to premarket notification requirements that were either high risk according to the RPS or intended to come in contact with tissue at high risk of being infected with CJD.

## III. Revisions to Attachment 1, List I, and List II

*A. Revisions to Attachment 1 (List of SUDs Known To Be Reprocessed or Considered for Reprocessing)*

FDA has evaluated the comments received regarding section 510(o) of the act. In doing so, the agency has determined that all noncompression heart stabilizers and endoscopic and laparoscopic electrosurgical accessories should be considered high risk devices when reprocessed.

Noncompression heart stabilizers are intended to move, lift, and position the heart while maintaining hemodynamic stability during cardiovascular surgery. The agency has determined that noncompression heart stabilizers are high risk devices when reprocessed because they include features, such as narrow tubing, interlocking parts, and small crevices that could impede cleaning and sterilization and because these devices contain materials, coatings, or components that may be damaged or altered by reprocessing. Therefore, these devices have the potential for a high risk of infection and/or inadequate performance when reprocessed. This includes noncompression heart stabilizers (device 21 in Attachment 1) classified under § 870.4500 (21 CFR 870.4500). In determining that noncompression heart stabilizers are high risk devices when reprocessed, a new product code has been created to identify these devices within regulation § 870.4500. The new product code is NQG. This new product code has been added to device 21 in Attachment 1 of this document.

Endoscopic and laparoscopic electrosurgical accessories are surgical instruments used during minimally invasive surgery, including vein harvesting. The agency has determined that these devices should be considered high risk devices when reprocessed because they include features, such as narrow lumens, that could impede thorough cleaning and sterilization and because these devices contain materials, coatings, or components that may be damaged or altered by reprocessing. Therefore, these devices have the potential for a high risk of infection or inadequate performance when reprocessed. This includes endoscopic and laparoscopic electrosurgical accessories (device 162 in Attachment 1) classified under § 878.4400 (21 CFR 878.4400). In determining that endoscopic and laparoscopic electrosurgical accessories are potentially high risk devices when reprocessed, a new product code has been created to identify these devices within regulation § 878.4400. The new product code is NUJ. This new product code has been added to device 162 in Attachment 1.

These changes are reflected in a revised version of Attachment 1 included in this **Federal Register** notice.

[2]This scheme is described in the February 2000 draft guidance document entitled, ''Reprocessing and Reuse of Single-Use Devices: Review Prioritization Scheme.'' *http://www.fda.gov/cdrh/reuse/1156.html.*

*B. Revisions to List I (Critical and Semicritical Reprocessed Single-Use Devices Previously Exempt from Premarket Notification Requirements that Now Require 510(k)s with Validation Data)*

Using the RPS, FDA has recategorized noncompression heart stabilizers from moderate risk to high risk when reprocessed, and the agency has therefore added noncompression heart stabilizers to List I. Manufacturers of noncompression heart stabilizers will be required to submit 510(k)s with validation data by December 29, 2006, which is 15 months following this revision of the list.

To help reprocessors be able to easily identify those critical and semicritical reprocessed SUDs that have been categorized into List I in this notice and previous **Federal Register** notices, FDA is re-issuing a complete listing of these devices. Therefore, List 1 now identifies all critical and semicritical reprocessed SUDs previously exempt from premarket notification requirements that now require 510(k)s with validation data.

*C. Revisions to List II (Reprocessed Single-Use Devices Subject to Premarket Notification Requirements that Now Require the Submission of Validation Data)*

Using the RPS, FDA has recategorized endoscopic and laparoscopic electrosurgical accessories under regulation § 878.4400 from moderate risk to high risk when reprocessed. Therefore, endoscopic and laparoscopic electrosurgical accessories have been added to List II. Under MDUFMA, manufacturers of these devices who have already obtained clearance through the 510(k) process must submit validation data regarding cleaning, sterilization, and functional performance by June 29, 2006, which is 9 months following this revision of the list. Upon publication of this notice, manufacturers who have not yet obtained clearance through the 510(k) process must submit 510(k)s including validation data regarding cleaning, sterilization, and functional performance, in addition to all the other required elements of a 510(k) identified in 21 CFR 807.87, in order to market these devices.

LIST I.—CRITICAL AND SEMICRITICAL REPROCESSED SINGLE-USE DEVICES PREVIOUSLY EXEMPT FROM PREMARKET NOTIFICATION REQUIREMENTS THAT NOW REQUIRE 510(K)S WITH VALIDATION DATA [MANUFACTURERS OF NONCOMPRESSION HEART STABILIZERS WILL NEED TO SUBMIT 510(K)S WITH VALIDATION DATA BY 15 MONTHS FOLLOWING THE PUBLICATION OF THIS REVISED LIST.]

| 21 CFR No. | Classification name | Product code for non-reprocessed device | Product code for reprocessed device | Product code name for reprocessed device |
|---|---|---|---|---|
| 868.6810 | Tracheobronchial suction catheter | BSY | NQV | Tracheobronchial suction catheter |
| 870.4500 | Cardiovascular surgical instruments | MWS | NQG | Noncompression heart stabilizer |
| 872.3240 | Dental bur | Diamond coated | NME | Dental diamond coated bur |
| 872.4535 | Dental diamond instrument | DZP | NLD | Dental diamond instrument |
| 872.4730 | Dental injection needle | DZM | NMW | Dental needle |
| 872.5410 | Orthodontic appliance and accessories | EJF | NQS | Orthodontic metal bracket |
| 874.4140 | Ear, nose, and throat bur | Microdebrider | NLY | ENT high speed microdebrider |
| 874.4140 | Ear, nose, and throat bur | Diamond coated | NLZ | ENT diamond coated bur |
| 874.4420 | Ear, nose, throat manual surgical .. | KAB, KBG, KCI | NLB | Laryngeal, sinus, tracheal trocar |
| 876.1075 | Gastroenterology-urology biopsy instrument | FCL | NON | Nonelectric biopsy forceps |
| 876.4680 | Ureteral stone dislodger | FGO, FFL | NQT, NQU | Flexible and basket stone dislodger |
| 878.4200 | Introduction/drainage catheter and accessories | GCB | NMT | Catheter needle |
| 878.4800 | Manual surgical instrument | MJG | NNA | Percutaneous biopsy device |
| 878.4800 | Manual surgical instrument | FHR | NMU | Gastro-Urology needle |
| 878.4800 | Manual surgical instrument for ... .... | DWO | NLK | Cardiovascular biopsy needle |
| 878.4800 | Manual surgical instrument for... | GAA | NNC | Aspiration and injection needle |
| 882.4190 | Forming/cutting clip instrument | HBS | NMN | Forming/cutting clip instrument |
| 884.1730 | Laparoscopic insufflator, .. | HIF | NMI | Laparoscopic insufflator and accessories |
| 884.4530 | OB/GYN specialized manual instrument | HFB | NMG | Gynecological biopsy forceps |
| 886.4350 | Manual ophthalmic surgical instrument | HNN | NLA | Ophthalmic knife |

LIST II.—REPROCESSED SINGLE-USE DEVICES SUBJECT TO PREMARKET NOTIFICATION REQUIREMENTS THAT NOW REQUIRE THE SUBMISSION OF VALIDATION DATA[1] [MANUFACTURERS OF ENDOSCOPIC AND LAPAROSCOPIC ELECTROSURGICAL ACCESSORIES WHO ALREADY HAVE 510(K) CLEARANCE FOR THESE DEVICES MUST SUBMIT VALIDATION DATA BY JUNE 29, 2006. ANY NEW 510(K) FOR THIS DEVICE TYPE WILL REQUIRE VALIDATION DATA UPON PUBLICATION OF THIS DOCUMENT.]

| 21 CFR No. | Classification name | Product code for nonreprocessed device | Product code for reprocessed device | Product code name for reprocessed device |
|---|---|---|---|---|
| Unclassified | Oocyte aspiration needles | MHK | NMO | Oocyte aspiration needles |
| Unclassified | Percutaneous transluminal angioplasty catheter | LIT | NMM | Transluminal peripheral angioplasty catheter |
| Unclassified | Ultrasonic surgical instrument | LFL | NLQ | Ultrasonic scalpel |
| 868.5150 | Anesthesia conduction needle | BSP | NNH | Anesthetic conduction needle (with/without introducer) |
| 868.5150 | Anesthesia conduction needle | MIA | NMR | Short term spinal needle |
| 868.5730 | Tracheal tube | BTR | NMA | Tracheal tube (with/without connector) |
| 868.5905 | Noncontinuous ventilator (IPPB) | BZD | NMC | Noncontinuous ventilator (respirator) mask |
| 870.1200 | Diagnostic intravascular catheter | DQO | NLI | Angiography catheter |
| 870.1220 | Electrode Recording Catheter | DRF | NLH | Electrode recording catheter |
| 870.1220 | Electrode Recording Catheter | MTD | NLG | Intracardiac mapping catheter |
| 870.1230 | Fiberoptic oximeter catheter | DQE | NMB | Fiberoptic oximeter catheter |
| 870.1280 | Steerable Catheter | DRA | NKS | Steerable Catheter |
| 870.1290 | Steerable catheter control system | DXX | NKR | Steerable catheter control system |
| 870.1330 | Catheter guide wire | DQX | NKQ | Catheter guide wire |
| 870.1390 | Trocar | DRC | NMK | Cardiovascular trocar |
| 870.1650 | Angiographic injector and syringe | DXT | NKT | Angiographic injector and syringe |
| 870.1670 | Syringe actuator for injector | DQF | NKW | Injector for actuator syringe |
| 870.2700 | Oximeter | MUD | NMD | Tissue saturation oximeter |
| 870.2700 | Oximeter | DQA | NLF | Oximeter |
| 870.3535 | Intra-aortic balloon and control system | DSP | NKO | Intra-aortic balloon and control system |
| 870.4450 | Vascular clamp | DXC | NMF | Vascular clamp |
| 870.4885 | External vein stripper | DWQ | NLJ | External vein stripper |
| 872.5470 | Orthodontic Plastic Bracket | DYW | NLC | Orthodontic Plastic Bracket |
| 874.4680 | Bronchoscope (flexible or rigid) and accessories | BWH | NLE | Bronchoscope (nonrigid) biopsy forceps |
| 876.1075 | Gastro-Urology biopsy instrument | FCG | NMX | G-U biopsy needle and needle set |
| 876.1075 | Gastroenterology-urology biopsy instrument | KNW | NLS | Biopsy instrument |
| 876.1500 | Endoscope and accessories | FBK, FHP | NMY | Endoscopic needle |
| 876.1500 | Endoscope and accessories | MPA | NKZ | Endoilluminator |
| 876.1500 | Endoscope and accessories | GCJ | NLM | General and plastic surgery laparoscope |

LIST II.—REPROCESSED SINGLE-USE DEVICES SUBJECT TO PREMARKET NOTIFICATION REQUIREMENTS THAT NOW REQUIRE THE SUBMISSION OF VALIDATION DATA[1] [MANUFACTURERS OF ENDOSCOPIC AND LAPAROSCOPIC ELECTROSURGICAL ACCESSORIES WHO ALREADY HAVE 510(K) CLEARANCE FOR THESE DEVICES MUST SUBMIT VALIDATION DATA BY JUNE 29, 2006. ANY NEW 510(K) FOR THIS DEVICE TYPE WILL REQUIRE VALIDATION DATA UPON PUBLICATION OF THIS DOCUMENT.]—Continued

| 21 CFR No. | Classification name | Product code for nonreprocessed device | Product code for reprocessed device | Product code name for reprocessed device |
|---|---|---|---|---|
| 876.1500 | Endoscope and accessories | FHO | NLX | Spring-loaded pneumoperitoneum needle |
| 876.4300 | Endoscopic electrosurgical unit and accessories | FAS | NLW | Active Urological electrosurgical electrode |
| 876.4300 | Endoscopic electrosurgical unit and accessories | FEH | NLV | Flexible suction coagulator electrode |
| 876.4300 | Endoscopic electrosurgical unit and accessories | KGE | NLU | Electric biopsy forceps |
| 876.4300 | Endoscopic electrosurgical unit and accessories | FDI | NLT | Flexible snare |
| 876.4300 | Endoscopic electrosurgical unit and accessories | KNS | NLR | Endoscopic (with or without accessories) Electrosurgical unit |
| 876.5010 | Biliary catheter and accessories | FGE | NML | Biliary catheter |
| 876.5540 | Blood access device and accessories | LBW | NNF | Single needle dialysis set (coaxial flow) |
| 876.5540 | Blood access device and accessories | FIE | NNE | Fistula needle |
| 876.5820 | Hemodialysis systems and accessories | FIF | NNG | Single needle dialysis set with uni-directional pump |
| 878.4300 | Implantable clip | FZP | NMJ | Implantable clip |
| 878.4400 | Electrosurgical Cutting and Coagulation Device and Accessories | GEI | NUJ | Endoscopic and laparoscopic electrosurgical accessories |
| 878.4750 | Implantable staple | GDW | NLL | Implantable staple |
| 880.5570 | Hypodermic single lumen needle | FMI | NKK | Hypodermic single lumen needle |
| 880.5860 | Piston Syringe | FMF | NKN | Piston Syringe |
| 882.4300 | Manual cranial drills, burrs, trephines and accessories | HBG | NLO | (Manual) drills, burrs, trephines and accessories |
| 882.4305 | Powered compound cranial drills, burrs, trephines . | HBF | NLP | (Powered, compound) drills, burrs, trephines and accessories |
| 882.4310 | Powered simple cranial drills, burrs, trephines . | HBE | NLN | (Simple, powered) drills, burrs, trephines and accessories |
| 884.1720 | Gynecologic laparoscope and accessories | HET | NMH | Gynecologic laparoscope (and accessories) |
| 884.6100 | Assisted reproduction needle | MQE | NNB | Assisted reproduction needle |
| 886.4370 | Keratome | HMY, HNO | NKY | Keratome blade |
| 886.4670 | Phacofragmentation system | HQC | NKX | Phacoemulsification needle |
| 892.5730 | Radionuclide brachytherapy source | IWF | NMP | Isotope needle |

[1]Hemodialyzers have been excluded from this list because the reuse of hemodialyzers is addressed in ''Draft Guidance for Hemodialyzer Reuse Labeling'' October 6, 1995. An archived copy may be obtained from CDRH's Division of Small Manufacturers, International, and Consumer Assistance, please contact *dsmica@cdrh.fda.gov*.

## IV. Stakeholder Input

In the **Federal Register** of February 4, 2003 (68 FR 5643), FDA invited interested persons to provide information and share views on the implementation of MDUFMA. Since that time, the agency has received comments on various MDUFMA provisions, including several on its implementation of section 510(o) of the act. As discussed above, one comment recommended that heart stabilizers should be considered high risk because of the risk of cross contamination and deterioration of the mechanical properties of the device. FDA agrees that noncompression heart stabilizers, a subset of all heart stabilizers, should be added to the list of critical reprocessed SUDs previously exempt from premarket notification requirements that will now require 510(k)s with validation data. Therefore, FDA has added noncompression heart stabilizers to List I.

Another comment recommended that FDA recategorize endoscopic vessel harvesting devices as high risk to be consistent with the categorization of other endoscopic accessories under 21 CFR 876.1500 (Endoscope and accessories). FDA agrees that endoscopic vessel harvesting devices should be considered high risk and subject to the submission of validation data. As discussed previously, in reviewing this comment, the agency also determined that laparoscopic electrosurgical accessories should be similarly categorized. Therefore, FDA has added laparoscopic and endoscopic electrosurgical accessories to List II.

Other additional comments requested that specific reprocessed SUDs be added to either List I or II. Each of these comments was carefully considered. However, FDA does not believe, based on the risk-based approach described in the April 30, 2003, **Federal Register** notice, that SUDs other than those identified in this notice should be added to the Lists at this time.

Another comment requested the FDA to call for the immediate submission and review of validation data regarding cleaning, sterilization, and functional performance for all reprocessed SUDs. The comment further stated that this request was based on the significant number of reprocessed devices which were withdrawn or were deemed to be insufficiently supported by validation data as of February 8, 2005.

Section 510(o) of the act required FDA to identify those reprocessed SUDs for which validation data must be submitted in order to ensure that those SUDs remain substantially equivalent to predicate devices after reprocessing. Because the agency has found that some reprocessed SUDs do not require the submission and review of validation data in order to demonstrate substantial equivalence, the agency identified the types of devices requiring the submission of validation data by implementing a risk-based approach. This risk-based approach, described in the April 30, 2003, **Federal Register** notice, identified a significant number of reprocessed SUDs that can no longer be legally marketed without agency review and clearance of validation data. The failure of some manufacturers to submit this validation data and the agency's review of submitted data resulted in a determination that a significant number of reprocessed SUDs could no longer be legally marketed. However, the process also identified a significant number of reprocessed SUDs that could continue to be marketed because: (1) they were found not to require the submission of additional validation data in order to ensure substantial equivalence to legally marketed predicate devices; or (2) after a review of submitted validation data, they were found to be substantially equivalent to legally marketed predicate devices. Therefore, FDA does not intend to expand the list of reprocessed SUDs subject to the submission and review of validation data to all reprocessed SUDs as requested in the comment. The agency believes it has implemented section 510(o) of the act by identifying the types of devices that require the submission of validation data and determining which of those devices can no longer be legally marketed.

## V. Comments

You may submit written or electronic comments on the designation of reprocessed noncompression heart stabilizers and laparoscopic and endoscopic electrosurgical devices requiring the submission of premarket notifications with validation data to the Division of Dockets Management (see **ADDRESSES**). Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Submit two copies of mailed comments, but individuals may submit one copy. You should identify your comments with the docket number found in brackets in the heading of this document. You may see any comments FDA receives in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

## Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 1 | Cardio | Cardiopulmonary Bypass Marker | Unclassified | | MAB | 1 | C | N |
| 2 | Cardio | Percutaneous & Operative Transluminal Coronary Angioplasty Catheter (PTCA) | Post-amend-ment | III | LOX | 3 | C | N |
| 3 | Cardio | Percutaneous Ablation Electrode | Post-amend-ment | III | LPB | 3 | C | N |
| 4 | Cardio | Peripheral Transluminal Angioplasty (PTA) Cath-eter | 870.1250 | II | LIT | 3 | C | N |
| 5 | Cardio | Blood-Pressure Cuff | 870.1120 | II | DXQ | 1 | N | N |
| 6 | Cardio | Angiography Catheter | 870.1200 | II | DQO | 3 | C | N |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 7 | Cardio | Electrode Recording Catheter | 870.1220 | II | DRF | 3 | C | N |
| 8 | Cardio | High-Density Array Catheter | 870.1220 | II | MTD | 3 | C | N |
| 9 | Cardio | Fiberoptic Oximeter Catheter | 870.1230 | II | DQE | 3 | C | N |
| 10 | Cardio | Steerable Catheter | 870.1280 | II | DRA | 3 | C | N |
| 11 | Cardio | Steerable Catheter Control System | 870.1290 | II | DXX | 3 | C | N |
| 12 | Cardio | Guide Wire | 870.1330 | II | DQX | 3 | C | N |
| 13 | Cardio | Angiographic Needle | 870.1390 | II | DRC | 3 | C | N |
| 14 | Cardio | Trocar | 870.1390 | II | DRC | 3 | C | N |
| 15 | Cardio | Syringes | 870.1650 | II | DXT | 3 | C | N |
| 16 | Cardio | Injector Type Syringe Actuator | 870.1670 | II | DQF | 3 | C | N |
| 17 | Cardio | Oximeter | 870.2700 | II | DQA | 3 | N | N |
| 18 | Cardio | Tissue Saturation Oximeter | 870.2700 | II | MUD | 3 | C | N |
| 19 | Cardio | Intra-Aortic Balloon System | 870.3535 | III | DSP | 3 | C | N |
| 20 | Cardio | Vascular Clamp | 870.4450 | II | DXC | 3 | C | N |
| 21 | Cardio | Heart Stabilizer | 870.4500 | I | MWS | 2 | C | Y |
| 22 | Cardio | Noncompression Heart Stabilizer | 870.4500 | I | MWS | 3 | C | Y |
| 23 | Cardio | External Vein Stripper | 870.4885 | II | DWQ | 3 | C | N |
| 24 | Cardio | Compressible Limb Sleeve | 870.5800 | II | JOW | 1 | N | N |
| 25 | Dental | Bur | 872.3240 | I | EJL | 1 | C | Y |
| 26 | Dental | Diamond Coated Bur | 872.3240 | I | EJL | 3 | C | Y |
| 27 | Dental | Diamond Instrument | 872.4535 | I | DZP | 3 | C | Y |
| 28 | Dental | AC-Powered Bone Saw | 872.4120 | II | DZH | 2 | C | N |
| 29 | Dental | Manual Bone Drill and Wire Driver | 872.4120 | II | DZJ | 2 | C | N |
| 30 | Dental | Powered Bone Drill | 872.4120 | II | DZI | 2 | C | N |
| 31 | Dental | Intraoral Drill | 872.4130 | I | DZA | 1 | C | Y |
| 32 | Dental | Injection needle | 872.4730 | I | DZM | 3 | C | Y |
| 33 | Dental | Metal Orthodontic Bracket | 872.5410 | I | EJF | 3 | S | Y |
| 34 | Dental | Plastic Orthodontic Bracket | 872.5470 | II | DYW | 3 | S | N |
| 35 | ENT | Bur | 874.4140 | I | EQJ | 1 | C | Y |
| 36 | ENT | Diamond Coated Bur | 874.4140 | I | EQJ | 3 | C | Y |
| 37 | ENT | Microdebrider | 874.4140 | I | EQJ | 3 | C | Y |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 38 | ENT | Microsurgical Argon Fiber Optic Laser Cable, For Uses Other Than Otology, Including Laryngology & General Use In Otolaryngology | 874.4490 | II | LMS | 1 | S | N |
| 39 | ENT | Microsurgical Argon Fiber Optic Laser Cable, For Use In Otology | 874.4490 | II | LXR | 1 | S | N |
| 40 | ENT | Microsurgical Carbon-Di-oxide Fiber Optic Laser Cable | 874.4500 | II | EWG | 1 | S | N |
| 41 | ENT | Bronchoscope Biopsy Forceps (Nonrigid) | 874.4680 | II | BWH | 3 | C | N |
| 42 | ENT | Bronchoscope Biopsy Forceps (Rigid) | 874.4680 | II | JEK | 1 | C | N |
| 43 | Gastro/ Urology | Biopsy Forceps Cover | 876.1075 | I | FFF | 1 | C | Y |
| 44 | Gastro/ Urology | Biopsy Instrument | 876.1075 | II | KNW | 3 | C | N |
| 45 | Gastro/ Urology | Biopsy Needle Set | 876.1075 | II | FCG | 3 | C | N |
| 46 | Gastro/ Urology | Biopsy Punch | 876.1075 | II | FCI | 2 | C | N |
| 47 | Gastro/ Urology | Mechanical Biopsy Instrument | 876.1075 | II | FCF | 2 | C | N |
| 48 | Gastro/ Urology | Nonelectric Biopsy Forceps | 876.1075 | I | FCL | 3 | C | Y |
| 49 | Gastro/ Urology | Cytology Brush For Endoscope | 876.1500 | II | FDX | 2 | S | N |
| 50 | Gastro/ Urology | Endoscope accessories | 876.1500 | II | KOG | 2 | S | N |
| 51 | Gastro/ Urology | Extraction Balloons/Baskets | 876.1500 | II | KOG | 2 | S | N |
| 52 | Gastro/Urology | Endoscopic needle | 876.1500 | II | FBK | 3 | C | N |
| 53 | Gastro/ Urology | Simple Pneumoperitoneum Needle | 876.1500 | II | FHP | 3 | C | N |
| 54 | Gastro/ Urology | Spring Loaded Pneumoperitoneum Needle | 876.1500 | II | FHO | 3 | C | N |
| 55 | Gastro/ Urology | Active Electrosurgical Electrode | 876.4300 | II | FAS | 3 | S | N |
| 56 | Gastro/ Urology | Biliary Sphincterotomes | 876.5010, 876.1500 | II | FGE | 3 | C | N |
| 57 | Gastro/ Urology | Electric Biopsy Forceps | 876.4300 | II | KGE | 3 | C | N |
| 58 | Gastro/ Urology | Electrosurgical Endoscopic Unit (With Or Without Accessories) | 876.4300 | II | KNS | 3 | S | N |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 59 | Gastro/ Urology | Flexible Snare | 876.4300 | II | FDI | 3 | S | N |
| 60 | Gastro/ Urology | Flexible Suction Coagulator Electrode | 876.4300 | II | FEH | 3 | S | N |
| 61 | Gastro/ Urology | Flexible Stone Dislodger | 876.4680 | II | FGO | 3 | S | Y |
| 62 | Gastro/ Urology | Metal Stone Dislodger | 876.4680 | II | FFL | 3 | S | Y |
| 63 | Gastro/ Urology | Needle Holder | 876.4730 | I | FHQ | 1 | C | Y |
| 64 | Gastro/ Urology | Nonelectrical Snare | 876.4730 | I | FGX | 1 | S | Y |
| 65 | Gastro/ Urology | Urological Catheter | 876.5130 | II | KOD | 2 | S | N |
| 66 | Gastro/Urology | Single needle dialysis set | 876.5540 | II | LBW, FIE | 3 | C | N |
| 67 | Gastro/ Urology | Hemodialysis Blood Circuit Accessories | 876.5820 | II | KOC | 2 | S | N |
| 68 | Gastro/Urology | Single needle dialysis set | 876.5820 | II | FIF | 3 | C | N |
| 69 | Gastro/Urology | Hemorrhoidal Ligator | 876.4400 | II | FHN | 2 | C | N |
| 70 | General Hospital | Implanted, Programmable Infusion Pump | Post-amendment | III | LKK | 3 | C | N |
| 71 | General Hospital | Needle Destruction Device | Post-amendment | III | MTV | 1 | N | N |
| 72 | General Hospital | Nonpowered Flotation Therapy Mattress | 880.5150 | I | IKY | 2 | N | Y |
| 73 | General Hospital | NonAC-Powered Patient Lift | 880.5510 | I | FSA | 2 | N | Y |
| 74 | General Hospital | Alternating Pressure Air Flotation Mattress | 880.5550 | II | FNM | 1 | N | Y |
| 75 | General Hospital | Temperature Regulated Water Mattress | 880.5560 | I | FOH | 2 | N | Y |
| 76 | General Hospital | Hypodermic Single Lumen Needle | 880.5570 | II | FMI | 3 | C | N |
| 77 | General Hospital | Piston Syringe | 880.5860 | II | FMF | 3 | C | N |
| 78 | General Hospital | Mattress Cover (Medical Purposes) | 880.6190 | I | FMW | 2 | N | Y |
| 79 | General Hospital | Disposable Medical Scissors | 880.6820 | I | JOK | 1 | N | Y |
| 80 | General Hospital | Irrigating Syringe | 880.6960 | I | KYZ, KYY | 1 | C | Y |
| 81 | Infection Control | Surgical Gowns | 878.4040 | II | FYA | 1 | C | N |
| 82 | Lab | Blood Lancet | 878.4800 | I | FMK | 1 | C | Y |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 83 | Neurology | Clip Forming/Cutting Instrument, | 882.4190 | I | HBS | 3* | C | Y |
| 84 | Neurology | Drills, Burrs, Trephines &Accessories (Manual) | 882.4300 | II | HBG | 3* | C | N |
| 85 | Neurology | Drills, Burrs, Trephines &Accessories (Compound, Powered) | 882.4305 | II | HBF | 3* | C | N |
| 86 | Neurology | Drills, Burrs, Trephines &Accessories (Simple, Powered) | 882.4310 | II | HBE | 3* | C | N |
| 87 | OB/GYN | Oocyte aspiration needle | | III | MHK | 3 | C | N |
| 88 | OB/GYN | Laparoscope accessories | 884.1720 | I | HET | 2 | C | Y |
| 89 | OB/GYN | Laparoscope Accessories | 884.1720 | II | HET | 3 | C | N |
| 90 | OB/GYN | Laparoscopic Dissectors | 884.1720 | I | HET | 2 | C | Y |
| 91 | OB/GYN | Laparoscopic Graspers | 884.1720 | I | HET | 2 | C | Y |
| 92 | OB/GYN | Laparoscopic Scissors | 884.1720 | I | HET | 2 | C | Y |
| 93 | OB/GYN | Insufflator accessories (tubing, Verres needle, kits) | 884.1730 | II | HIF | 3 | C | Y |
| 94 | OB/GYN | Laparoscopic Insufflator | 884.1730 | II | HIF | 2 | N | N |
| 95 | OB/GYN | Endoscopic Electrocautery and Accessories | 884.4100 | II | HIM | 2 | N | N |
| 96 | OB/GYN | Gynecologic Electrocautery (and Accessories) | 884.4120 | II | HGI | 2 | N | N |
| 97 | OB/GYN | Endoscopic Bipolar Coagulator-Cutter (and Accessories) | 884.4150 | II | HIN | 2 | N | N |
| 98 | OB/GYN | Culdoscopic Coagulator (and Accessories) | 884.4160 | II | HFI | 2 | N | N |
| 99 | OB/GYN | Endoscopic Unipolar Coagulator-Cutter (and Accessories) | 884.4160 | II | KNF | 2 | N | N |
| 100 | OB/GYN | Hysteroscopic Coagulator (and Accessories) | 884.4160 | II | HFH | 2 | N | N |
| 101 | OB/GYN | Unipolar Laparoscopic Coagulator (and Accessories) | 884.4160 | II | HFG | 2 | N | N |
| 102 | OB/GYN | Episiotomy Scissors | 884.4520 | I | HDK | 1 | C | Y |
| 103 | OB/GYN | Umbilical Scissors | 884.4520 | I | HDJ | 1 | C | Y |
| 104 | OB/GYN | Biopsy Forceps | 884.4530 | I | HFB | 3 | C | Y |
| 105 | OB/GYN | Assisted reproduction needle | 884.6100 | II | MQE | 3 | C | N |
| 106 | Ophthalmic | Endoilluminator | 876.1500 | II | MPA | 3* | C | N |
| 107 | Ophthalmic | Surgical Drapes | 878.4370 | II | KKX | 2 | C | N |
| 108 | Ophthalmic | Ophthalmic Knife | 886.4350 | I | HNN | 3 | C | Y |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 109 | Ophthalmic | Keratome Blade | 886.4370 | I | HMY, HNO | 3 | C | N |
| 110 | Ophthalmic | Phacoemulsification Needle | 886.4670 | II | HQC | 3 | C | N |
| 111 | Ophthalmic | Phacoemulsification/ Phacofragmentation Fluidic | 886.4670 | II | MUS | 2 | C | N |
| 112 | Ophthalmic | Phacofragmentation Unit | 886.4670 | II | HQC | 1 | N | N |
| 113 | Orthopedic | Saw Blades | 878.4820 | I | GFA, DWH, GEY, GET | 1 | C | Y |
| 114 | Orthopedic | Surgical Drills | 878.4820 | I | GEY, GET | 1 | C | Y |
| 115 | Orthopedic | Arthroscope accessories | 888.1100 | II | HRX | 2 | C | Y |
| 116 | Orthopedic | Bone Tap | 888.4540 | I | HWX | 1 | C | Y |
| 117 | Orthopedic | Burr | 888.4540 | I | HTT | 1 | C | Y |
| 118 | Orthopedic | Carpal Tunnel Blade | 888.4540 | I | LXH | 2 | C | Y |
| 119 | Orthopedic | Countersink | 888.4540 | I | HWW | 1 | C | Y |
| 120 | Orthopedic | Drill Bit | 888.4540 | I | HTW | 1 | C | Y |
| 121 | Orthopedic | Knife | 888.4540 | I | HTS | 1 | C | Y |
| 122 | Orthopedic | Manual Surgical Instrument | 888.4540 | I | LXH | 1 | C | Y |
| 123 | Orthopedic | Needle Holder | 888.4540 | I | HXK | 1 | C | Y |
| 124 | Orthopedic | Reamer | 888.4540 | I | HTO | 1 | C | Y |
| 125 | Orthopedic | Rongeur | 888.4540 | I | HTX | 1 | C | Y |
| 126 | Orthopedic | Scissors | 888.4540 | I | HRR | 1 | C | Y |
| 127 | Orthopedic | Staple Driver | 888.4540 | I | HXJ | 1 | C | Y |
| 128 | Orthopedic | Trephine | 888.4540 | I | HWK | 1 | C | Y |
| 129 | Orthopedic | Flexible Reamers/Drills | 886.4070 878.4820 | I | GEY, HRG | 1 | C | Y |
| 130 | Orthopedic | External Fixation Frame | 888.3040 888.3030 | II | JEC KTW KTT | 2 | N | N |
| 131 | Physical Medicine | Nonheating Lamp for Adjunctive Use Inpatient Therapy | 890.5500 | II | NHN | 1 | N | N |
| 132 | Physical Medicine | Electrode Cable, | 890.1175 | II | IKD | 1 | N | Y |
| 133 | Physical Medicine | External Limb Component, Hip Joint | 890.3420 | I | ISL | 2 | N | Y |
| 134 | Physical Medicine | External Limb Component, Knee Joint | 890.3420 | I | ISY | 2 | N | Y |
| 135 | Physical Medicine | External Limb Component, Mechanical Wrist | 890.3420 | I | ISZ | 2 | N | Y |
| 136 | Physical Medicine | External Limb Component, Shoulder Joint | 890.3420 | I | IQQ | 2 | N | Y |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 137 | Plastic Surgery | Stapler | 878.4800 | I | GAG, GEF, FHM, HBT | 2 | C | Y |
| 138 | Radiology | Isotope Needle | 892.5730 | II | IWF | 3 | C | N |
| 139 | Respiratory | Endotracheal Tube Changer | Unclassified | III | LNZ | 3 | C | N |
| 140 | Respiratory | Anesthesia conduction needle | 868.5150 | II | BSP | 3 | C | N |
| 141 | Respiratory | Short term spinal needle | 868.5150 | II | MIA | 3 | C | N |
| 142 | Respiratory | Respiratory Therapy and Anesthesia Breathing Circuits | 868.5240 | I | CAI | 2 | S | Y |
| 143 | Respiratory | Oral and Nasal Catheters | 868.5350 | I | BZB | 1 | C | Y |
| 144 | Respiratory | Gas Masks | 868.5550 | I | BSJ | 1 | S | Y |
| 145 | Respiratory | Breathing Mouthpiece | 868.5620 | I | BYP | 1 | N | Y |
| 146 | Respiratory | Tracheal Tube | 868.5730 | II | BTR | 3 | C | N |
| 147 | Respiratory | Airway Connector | 868.5810 | I | BZA | 2 | S | Y |
| 148 | Respiratory | CPAP Mask | 868.5905 | II | BZD | 3 | S | N |
| 149 | Respiratory | Emergency Manual Resuscitator | 868.5915 | II | BTM | 2 | S | N |
| 150 | Respiratory | Tracheobronchial Suction Catheter | 868.6810 | I | BSY | 3 | S | Y |
| 151 | Surgery | AC-powered Orthopedic Instrument and accessories | 878.4820 | I | HWE | 2 | C | N |
| 152 | Surgery | Breast Implant Mammary Sizer | Unclassified | | MRD | 1 | C | N |
| 153 | Surgery | Ultrasonic Surgical Instrument | Unclassified | | LFL | 3 | C | N |
| 154 | Surgery | Trocar | 874.4420 | I | KAB, KBG, KCI | 3 | C | Y |
| 155 | Surgery | Endoscopic Blades | 876.1500 | II | GCP, GCR | 2 | C | N |
| 156 | Surgery | Endoscopic Guidewires | 876.1500 | II | GCP, GCR | 1 | C | N |
| 157 | Surgery | Inflatable External Extremity Splint | 878.3900 | I | FZF | 1 | N | Y |
| 158 | Surgery | Noninflatable External Extremity Splint | 878.3910 | I | FYH | 1 | N | Y |
| 159 | Surgery | Catheter needle | 878.4200 | I | GCB | 3 | C | Y |
| 160 | Surgery | Implantable Clip | 878.4300 | II | FZP | 3 | C | N |
| 161 | Surgery | Electrosurgical and Coagulation Unit With Accessories | 878.4400 | II | BWA | 2 | C | N |
| 162 | Surgery | Electrosurgical Apparatus | 878.4400 | II | HAM | 2 | C | N |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 163 | Surgery | Electrosurgical Cutting & Coagulation Device & Accessories | 878.4400 | II | GEI<br>NUJ | 2<br>3 | C | N |
| 164 | Surgery | Electrosurgical Device | 878.4400 | II | DWG | 2 | C | N |
| 165 | Surgery | Electrosurgical Electrode | 878.4400 | II | JOS | 2 | C | N |
| 166 | Surgery | Implantable Staple, Clamp, Clip for Suturing Apparatus | 878.4750 | II | GDW | 3 | C | N |
| 167 | Surgery | Percutaneous biopsy device | 878.4800 | I | MJG | 3 | C | Y |
| 168 | Surgery | Gastro-Urology needle | 878.4800 | I | FHR | 3 | C | Y |
| 169 | Surgery | Aspiration and injection needle | 878.4800 | I | GAA | 3 | C | Y |
| 170 | Surgery | Biopsy Brush | 878.4800 | I | GEE | 1 | C | Y |
| 171 | Surgery | Blood Lancet | 878.4800 | I | FMK | 1 | C | Y |
| 172 | Surgery | Bone Hook | 878.4800 | I | KIK | 1 | C | Y |
| 173 | Surgery | Cardiovascular Biopsy Needle | 878.4800 | I | DWO | 3 | C | Y |
| 174 | Surgery | Clamp | 878.4800 | I | GDJ | 1 | C | Y |
| 175 | Surgery | Clamp | 878.4800 | I | HXD | 1 | C | Y |
| 176 | Surgery | Curette | 878.4800 | I | HTF | 1 | C | Y |
| 177 | Surgery | Disposable Surgical Instrument | 878.4800 | I | KDC | 1 | C | Y |
| 178 | Surgery | Disposable Vein Stripper | 878.4800 | I | GAJ | 1 | C | Y |
| 179 | Surgery | Dissector | 878.4800 | I | GDI | 1 | C | Y |
| 180 | Surgery | Forceps | 878.4800 | I | GEN | 2 | C | Y |
| 181 | Surgery | Forceps | 878.4800 | I | HTD | 2 | C | Y |
| 182 | Surgery | Gouge | 878.4800 | I | GDH | 1 | C | Y |
| 183 | Surgery | Hemostatic Clip Applier | 878.4800 | I | HBT | 2 | C | Y |
| 184 | Surgery | Hook | 878.4800 | I | GDG | 1 | C | Y |
| 185 | Surgery | Manual Instrument | 878.4800 | I | MDM, MDW | 1 | C | Y |
| 186 | Surgery | Manual Retractor | 878.4800 | I | GZW | 1 | C | Y |
| 187 | Surgery | Manual Saw and Accessories | 878.4800 | I | GDR HAC | 1 | C | Y |
| 188 | Surgery | Manual Saw and Accessories | 878.4800 | I | HAC | 1 | C | Y |
| 189 | Surgery | Manual Surgical Chisel | 878.4800 | I | FZO | 1 | C | Y |
| 190 | Surgery | Mastoid Chisel | 878.4800 | I | JYD | 1 | C | Y |
| 191 | Surgery | Orthopedic Cutting Instrument | 878.4800 | I | HTZ | 1 | C | Y |
| 192 | Surgery | Orthopedic Spatula | 878.4800 | I | HXR | 1 | C | Y |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 193 | Surgery | Osteotome | 878.4800 | I | HWM | 1 | C | Y |
| 194 | Surgery | Rasp | 878.4800 | I | GAC | 1 | C | Y |
| 195 | Surgery | Rasp | 878.4800 | I | HTR | 1 | C | Y |
| 196 | Surgery | Retractor | 878.4800 | I | GAD | 1 | C | Y |
| 197 | Surgery | Retractor | 878.4800 | I | HXM | 1 | C | Y |
| 198 | Surgery | Saw | 878.4800 | I | HSO | 1 | C | Y |
| 199 | Surgery | Scalpel Blade | 878.4800 | I | GES | 1 | C | Y |
| 200 | Surgery | Scalpel Handle | 878.4800 | I | GDZ | 1 | C | Y |
| 201 | Surgery | Scissors | 878.4800 | I | LRW | 1 | C | Y |
| 202 | Surgery | Snare | 878.4800 | I | GAE | 1 | C | Y |
| 203 | Surgery | Spatula | 878.4800 | I | GAF | 1 | C | Y |
| 204 | Surgery | Staple Applier | 878.4800 | I | GEF | 2 | C | Y |
| 205 | Surgery | Stapler | 878.4800 | I | GAG | 2 | C | Y |
| 206 | Surgery | Stomach and Intestinal Suturing Apparatus | 878.4800 | I | FHM | 2 | C | Y |
| 207 | Surgery | Surgical Curette | 878.4800 | I | FZS | 1 | C | Y |
| 208 | Surgery | Surgical Cutter | 878.4800 | I | FZT | 1 | C | Y |
| 209 | Surgery | Surgical Knife | 878.4800 | I | EMF | 1 | S | Y |
| 210 | Surgery | Laser Powered Instrument | 878.4810 | II | GEX | 2 | C | N |
| 211 | Surgery | AC-Powered Motor | 878.4820 | I | GEY | 2 | C | Y |
| 212 | Surgery | Bit | 878.4820 | I | GFG | 1 | C | Y |
| 213 | Surgery | Bur | 878.4820 | I | GFF, GEY | 1 | C | Y |
| 214 | Surgery | Cardiovascular Surgical Saw Blade | 878.4820 | I | DWH | 1 | C | Y |
| 215 | Surgery | Chisel (Osteotome) | 878.4820 | I | KDG | 1 | C | Y |
| 216 | Surgery | Dermatome | 878.4820 | I | GFD | 1 | C | Y |
| 217 | Surgery | Electrically Powered Saw | 878.4820 | I | DWI | 2 | C | Y |
| 218 | Surgery | Pneumatic Powered Motor | 878.4820 | I | GET | 2 | C | Y |
| 219 | Surgery | Pneumatically Powered Saw | 878.4820 | I | KFK | 2 | C | Y |
| 220 | Surgery | Powered Saw and Accessories | 878.4820 | I | HAB | 2 | C | Y |
| 221 | Surgery | Saw Blade | 878.4820 | I | GFA | 1 | C | Y |
| 222 | Surgery | Nonpneumatic Tourniquet | 878.5900 | I | GAX | 1 | N | Y |
| 223 | Surgery | Pneumatic Tourniquet | 878.5910 | I | KCY | 1 | N | Y |
| 224 | Surgery | Endoscopic Staplers | 888.4540 | I | HXJ | 2 | C | Y |
| 225 | Surgery | Trocar | 876.1500 870.1390 | II | GCJ, DRC | 3 | C | N |

**Attachment 1 List of SUDs Known To Be Reprocessed or Considered for Reprocessing**—Continued

| | Medical Specialty | Device Type | Regulation Number | Class | Product Code | Risk[A] | Critical/ Semicritical/Non-critical | Premarket Exempt |
|---|---|---|---|---|---|---|---|---|
| 226 | Surgery | Surgical Cutting Accessories | 878.4800, 874.4420 | I | GDZ, GDX, GES, KBQ, KAS | 2 | C | Y |
| 227 | Surgery | Electrosurgical Electrodes/ Handles/Pencils | 876.4300 878.4400 | II | HAM, GEI, FAS | 2 | C | N |
| 228 | Surgery | Scissor Tips | 878.4800, 884.4520, 874.4420 | I | LRW, HDK, HDJ, JZB, KBD | 2 | C | Y |
| 229 | Surgery | Laser Fiber Delivery Systems | 878.4810 874.4500 886.4390 884.4550 886.4690 | II | GEX EWG LLW HQF HHR HQB | 1 | C | N |

[A]Risk categorization may be either:
1 = low risk according to RPS
2 = moderate risk according to RPS
3 = high risk according to RPS
3* = high risk due to neurological use
See section II of this document, ''FDA's Implementation of New Section 510(o) of the Act'' for methodology and criteria used to identify the risk.

Dated: September 22, 2005.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 05–19510 Filed 9–28–05; 8:45 am]

**BILLING CODE 4160–01–S**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Agency Information Collection Activities: Proposed Collection; Comment Request

In compliance with the requirement for opportunity for public comment on proposed data collection projects (section 3506(c)(2)(A) of Title 44, United States Code, as amended by the Paperwork Reduction Act of 1995, Pub. L. 104–13), the Health Resources and Services Administration (HRSA) publishes periodic summaries of proposed projects being developed for submission to OMB under the Paperwork Reduction Act of 1995. To request more information on the proposed project or to obtain a copy of the data collection plans and draft instruments, call the HRSA Reports Clearance Officer at (301) 443–1129.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

**Proposed Project: Maternal and Child Health Services Title V Block Grant Program—Guidance and Forms for the Title V Application/Annual Report, OMB No.0915–0172: Revision**

The Health Resources and Services Administration (HRSA) proposes to revise the *Maternal and Child Health Services Title V Block Grant Program—Guidance and Forms for the Application/Annual Report.* The guidance is used annually by the 50 States and 9 jurisdictions in making application for Block Grants under Title V of the Social Security Act, and in preparing the required annual report. The proposed revisions follow and build on extensive consultation received from a workgroup convened to provide suggestions to improve the guidance and forms. The proposed revisions are editorial and technical revisions based on the experience of the states and jurisdictions in using the guidance and forms since 2003.

Two new performance measures were developed (obesity in children aged 2 to 5 years; and smoking in the last trimester of pregnancy) and two existing performance measures were either removed entirely (low birth weight) or incorporated into an existing health status capacity indicator (eligible children receiving services under Medicaid). This will result in no net increase in the number of performance measures. In addition, the directions in the guidance for the Health Systems Capacity Indicators (HSCI) were expanded to enhance clarification. This proposed change will make it easier for the states to report on these indicators.

The existing electronic system used by the states to submit their Block Grant Application and Annual Report has also been enhanced. First, using the electronic system, the narrative from the prior year's submission is available online in the system so that the applicant need only edit those sections that have changed. This reduces burden by avoiding duplicating material. For national performance measures 2–6, the data obtained from the National Survey of Children with Special Health Care Needs are pre-populated which eliminates the need to retrieve and enter data from this survey, unless the states choose to use another data source. Also, notes from the prior year's submission are available to the states allowing for more efficient updating through edits rather then recreating them. Data are entered once (in a data entry field on a given form), and where those data are referenced elsewhere, the value is

copied and displayed. The electronic system includes an automatic character counter that tells the user how many characters the states have left. This eliminates the need to independently track entries against the Maternal and Child Health Bureau's limits for each section and ensures compliance. The electronic system includes forms status checker and data alerts, which conduct automated checks on data validity, data consistency, and application completeness, as well as value tolerance checks. This facilitates application review and eliminates much of previously required data cleaning activity. Also, this allows the user to obtain an immediate update at any point in time on the completeness and compliance of the application, reducing the need to conduct a review of the application. Data are saved directly to the HRSA server so that no manual transmission is required. Finally, the automatic commitment of data to the HRSA server eliminates the need for version control or data migration.

The estimated average annual burden per year is as follows for the Annual Report and Application without the Needs Assessment:

| Type of respondent | Number of respondents | Responses per respondent | Burden hours per response | Total burden hours |
|---|---|---|---|---|
| States | 50 | 1 | 297 | 14,868 |
| Jurisdictions | 9 | 1 | 120 | 1,077 |
| Total | | | 59 | 15,945 |

Burden in the 3 Year Reporting Cycle for the Annual Report and Application with Needs Assessment is:

| Needs assessment | Number of respondents | Burden hours per responses | Responses per respondent | Total burden hours |
|---|---|---|---|---|
| States/Jurisdictions | 59 | 378.5 | 1 | 22,303 |
| Total *Average* Burden for 3 year cycle | | | | 18,064 |

Send comments to Susan G. Queen, PhD., HRSA Reports Clearance Officer, Room 10–33, Parklawn Building, 5600 Fishers Lane, Rockville, MD 20857. Written comments should be received within 60 days of notice.

Dated: September 23, 2005.

**Tina M. Cheatham,**

*Director, Division of Policy Review and Coordination.*

[FR Doc. 05–19432 Filed 9–28–05; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Ricky Ray Hemophilia Relief Fund Program Administrative Close-Out

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice.

**SUMMARY:** This Notice announces the administrative close-out of the Ricky Ray Hemophilia Relief Fund Program (the Program). All business concerning petitions and related payment documentation associated with the Program will conclude on October 31, 2005.

As of that date, the Program will cease to accept or process any additional documentation submitted by individuals (or their representatives) relating to the eligibility or payment of petitions still pending. Remaining funds will be returned to the United States Treasury, and the Program will archive all outstanding documentation at the Washington National Records Center in Suitland, Maryland, in accordance with the requirements of the National Archives and Records Administration.

**DATES:** Effective Date: October 31, 2005.

**ADDRESSES:** Ricky Ray Hemophilia Relief Fund Program, Healthcare Systems Bureau, Health Resources and Services Administration, U.S. Department of Health and Human Services, 5600 Fishers Lane, Room 11C–06, Rockville, Maryland 20857.

**FOR FURTHER INFORMATION CONTACT:** Paul T. Clark, Director, Ricky Ray Hemophilia Relief Fund Program, 5600 Fishers Lane, Room 11C–06, Rockville, MD 20857; (301) 443–2330.

**SUPPLEMENTARY INFORMATION:** The Program implemented the Ricky Ray Hemophilia Relief Fund Act of 1998 (the Act), Pub. Law 105–369. The Act established a Trust Fund to provide compassionate payments to individuals with blood-clotting disorders, such as hemophilia, who were treated with antihemophilic factor between July 1, 1982 and December 31, 1987, and contracted human immunodeficiency virus (HIV), as well as to certain persons who contracted HIV from these individuals. In the event individuals eligible for payment were deceased, the Act also provided for payments to certain survivors of these individuals.

Under section 101(d) of the Act, the Trust Fund terminated on November 12, 2003. The Act requires all remaining funds to be deposited in the miscellaneous receipts account in the Treasury of the United States.

The Program has made compassionate payments totaling in excess of $559 million to more than 7,171 eligible individuals and survivors.

Dated: September 22, 2005.

**Dennis P. Williams,**

*Deputy Administrator.*

[FR Doc. 05–19430 Filed 9–28–05; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

### Meetings: Organ Transplantation Advisory Committee

**AGENCY:** Health Resources and Services Administration, HHS.

**ACTION:** Notice of Meeting of the Advisory Committee on Organ Transplantation.

**SUMMARY:** Pursuant to Public Law 92–463, the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the ninth meeting of the Advisory Committee on Organ Transplantation (ACOT), Department of Health and Human Services (HHS). The meeting will be held from approximately 9 a.m. to 5:30 p.m. on November 3, 2005, and from 9 a.m. to 3 p.m. on November 4, 2005, at the Rockville DoubleTree Hotel, 1750 Rockville Pike, Rockville, Maryland 20852. The meeting will be open to the public; however, seating is limited and pre-registration is encouraged (see below).

**SUPPLEMENTARY INFORMATION:** Under the authority of 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended, and 42 CFR 121.12 (2000), ACOT was established to assist the Secretary in enhancing organ donation, ensuring that the system of organ transplantation is grounded in the best available medical science, and assuring the public that the system is as effective and equitable as possible, and, thereby, increasing public confidence in the integrity and effectiveness of the transplantation system. ACOT is composed of up to 25 members, including the Chair. Members are serving as Special Government Employees and have diverse backgrounds in fields such as organ donation, health care public policy, transplantation medicine and surgery, critical care medicine and other medical specialties involved in the identification and referral of donors, non-physician transplant professions, nursing, epidemiology, immunology, law and bioethics, behavioral sciences, economics and statistics, as well as representatives of transplant candidates, transplant recipients, organ donors, and family members.

ACOT will hear presentations on living donor guidelines in New York and North Carolina, insurance issues related to living donors, deceased donor organ utilization, new Organ Procurement and Transplantation Network (OPTN) Lung Allocation System, OPTN development of a new Kidney Allocation System, OPTN decision to not develop a living donor registry, OPTN Strategic Planning, Organ Transplant Breakthrough Collaborative, and the Organ Procurement Organization Redesign Initiative.

The draft meeting agenda will be available on October 17 on the Department's donation Web site at *http://www.organdonor.gov/acot.html*.

A registration form will be available on October 3 on the Department's donation Web site at *http://www.organdonor.gov/acot.html*. The completed registration form should be submitted by facsimile to Professional and Scientific Associates (PSA), the logistical support contractor for the meeting, at fax number (703) 234–1701. Individuals without access to the Internet who wish to register may call Bryan Slattery with PSA at (703) 234–1734. Individuals who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the ACOT Executive Director, Thomas E. Balbier, Jr., in advance of the meeting. Mr. Balbier may be reached by telephone at 301–443–1896, e-mail: *Thom.Balbier@hrsa.hhs.gov*, or in writing at the address of the Division of Transplantation provided below. Management and support services for ACOT functions are provided by the Division of Transplantation, Healthcare Systems Bureau, Health Resources and Services Administration, 5600 Fishers Lane, Parklawn Building, Room 12C–06, Rockville, Maryland 20857; telephone number 301–443–7577.

After the presentations and ACOT discussions, members of the public will have an opportunity to provide comments. Because of the Committee's full agenda and the timeframe in which to cover the agenda topics, public comment will be limited. All public comments will be included in the record of the ACOT meeting.

Dated: September 22, 2005.

**Elizabeth M. Duke,**

*Administrator.*

[FR Doc. 05–19431 Filed 9–28–05; 8:45 am]

**BILLING CODE 4165–15–P**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2005–21473]**

### Collection of Information Under Review by Office of Management and Budget (OMB): 1625–0010

**AGENCY:** Coast Guard, DHS.

**ACTION:** Request for comments. -

**SUMMARY:** In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the Coast Guard has forwarded one Information Collection Request (ICR)—1625–0010, Defect/Noncompliance Report and Campaign Update Report—abstracted below, to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) for review and comment. Our ICR describes the information we seek to collect from the public. Review and comment by OIRA ensures that we impose only paperwork burdens commensurate with our performance of duties.

**DATES:** Please submit comments on or before October 31, 2005.

**ADDRESSES:** To make sure that your comments and related material do not reach the docket [USCG–2005–21473] or OIRA more than once, please submit them by only one of the following means:

(1)(a) By mail to the Docket Management Facility, U.S. Department of Transportation (DOT), room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001. (b) By mail to OIRA, 725 17th St NW., Washington, DC 20503, to the attention of the Desk Officer for the Coast Guard.

(2)(a) By delivery to room PL–401 at the address given in paragraph (1)(a) above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329. (b) By delivery to OIRA, at the address given in paragraph (1)(b) above, to the attention of the Desk Officer for the Coast Guard.

(3) By fax to (a) the Facility at (202) 493–2298 and (b) OIRA at (202) 395–6566, or e-mail to OIRA at *oira-docket@omb.eop.gov attention:* Desk Officer for the Coast Guard.

(4)(a) Electronically through the Web site for the Docket Management System at *http://dms.dot.gov*. (b) OIRA does not have a Web site on which you can post your comments.

The Docket Management Facility maintains the public docket for this notice. Comments and material received from the public, as well as documents mentioned in this notice as being available in the docket, will become part of this docket and will be available for inspection or copying at room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet at *http://dms.dot.gov.*

Copies of the complete ICR are available through this docket on the Internet at *http://dms.dot.gov*, and also from Commandant (CG–611), U.S. Coast Guard Headquarters, room 6106 (Attn: Ms. Barbara Davis), 2100 Second Street SW., Washington, DC 20593–0001. The telephone number is (202) 267–2326.

**FOR FURTHER INFORMATION CONTACT:** Ms. Barbara Davis, Office of Information Management, telephone (202) 267–2326 or fax (202) 267–4814, for questions on these documents; or Ms. Andrea M. Jenkins, Program Manager, Docket Operations, (202) 366–0271, for questions on the docket.

**SUPPLEMENTARY INFORMATION:** The Coast Guard invites comments on the proposed collection of information to determine whether the collection is necessary for the proper performance of the functions of the Department. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of the information that is the subject of the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to DMS or OIRA must contain the OMB Control Number of the Information Collection Request (ICR) addressed. Comments to DMS must contain the docket number of this request, [USCG 2005–21473]. For your comments to OIRA to be considered, it is best if OIRA receives them on or before the October 31, 2005.

*Public participation and request for comments:* We encourage you to respond to this request for comments by submitting comments and related materials. We will post all comments received, without change, to *http://dms.dot.gov*, and they will include any personal information you have provided. We have an agreement with DOT to use their Docket Management Facility. Please see the paragraph on DOT's ''Privacy Act Policy'' below.

*Submitting comments:* If you submit a comment, please include your name and address, identify the docket number for this request for comment [USCG–2005–21473], indicate the specific section of this document or the ICR to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**, but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

The Coast Guard and OIRA will consider all comments and material received during the comment period. We may change the documents supporting this collection of information or even the underlying requirements in view of them.

*Viewing comments and documents:* To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://dms.dot.gov* at any time and conduct a simple search using the docket number. You may also visit the Docket Management Facility in room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone can search the electronic form of all comments received in dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Privacy Act Statement of DOT in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov*.

**Previous Request for Comments**

This request provides a 30-day comment period required by OIRA. The Coast Guard has already published the 60-day notice (70 FR 38703, July 5, 2005) required by 44 U.S.C. 3506(c)(2). That notice elicited no comment.

**Information Collection Request**

*Title:* Defect/Noncompliance Report and Campaign Update Report

*OMB Control Number:* 1625–0010.

*Type of Request:* Extension of a currently approved collection.

*Affected Public:* Manufacturers of boats and certain items of ''designated'' associated equipment (inboard engines, outboard motors, or sterndrive engines).

*Forms:* CG–4917 and CG–4918.

*Abstract:* Manufacturers whose products contain defects which create a substantial risk of personal injury to the public or which fail to comply with an applicable U.S. Coast Guard safety standard are required to conduct defect notification and recall campaigns in accordance with 46 U.S.C. 4310. Regulations in 33 CFR part 179 require manufacturers to submit certain reports to the Coast Guard about progress made in notifying owners and making repairs.

*Burden Estimates:* The estimated burden has been decreased from 328 hours to 315 hours a year.

Dated: September 20, 2005.

**R.T. Hewitt,**

*Rear Admiral, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.*

[FR Doc. 05–19421 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–15–U**

## DEPARTMENT OF HOMELAND SECURITY

### Coast Guard

**[USCG–2005–22234]**

### National Offshore Safety Advisory Committee

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of meeting cancellation and rescheduling.

**SUMMARY:** The meetings of the National Offshore Safety Advisory Committee (NOSAC) and its Liftboat III Subcommittee announced in the August 30, 2005 **Federal Register** (70 FR 51360) that were to be held in New Orleans are cancelled. These meetings have been rescheduled in Houston where NOSAC and its Subcommittee will meet to discuss various issues relating to offshore safety and security. Both meetings will be open to the public.

**DATES:** NOSAC will meet on Thursday, December 8, 2005, from 9 a.m. to 3 p.m. The Liftboat III Subcommittee will meet on Wednesday, December 7, 2005, from 1:30 p.m. to 3 p.m. These meetings may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before November 23, 2005. Requests to have a copy of your material distributed to each member of the committee should reach the Coast Guard on or before November 23, 2005.

**ADDRESSES:** NOSAC will meet in ''Conference Room A/B'' of the Hilton Westchase Hotel and Towers, 9999 Westheimer Road, Houston, Texas. The Liftboat III Subcommittee will meet in the same room of the same hotel. Send written material and requests to make oral presentations to Commander J.M. Cushing, Commandant (G–MSO–2), U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001. This notice is available on the Internet at *http://dms.dot.gov*.

**FOR FURTHER INFORMATION CONTACT:** Commander J.M. Cushing, Executive Director of NOSAC, or Mr. Jim Magill, Assistant to the Executive Director, telephone 202–267–1082, fax 202–267–4570.

**SUPPLEMENTARY INFORMATION:** Notice of the meetings is given under the Federal

Advisory Committee Act, 5 U.S.C. App. 2.

**Agenda of Meetings**

*National Offshore Safety Advisory Committee*. The agenda includes the following:

(1) Report on issues concerning the International Maritime Organization and the International Organization for Standardization.

(2) Report from Subcommittee on Safety of Life at Sea (SOLAS) compliance of U.S. flagged Offshore Support Vessels including Liftboats.

(3) Report from the Liftboat III Subcommittee on Liftboat Licenses.

(4) Offshore Helidecks—new and revised API and ICAO standards.

(5) Revision of 33 CFR Chapter I, Subchapter N, Outer Continental Shelf activities.

(6) 33 CFR Chapter I, Subchapter NN, Temporary Final Rule on Deepwater Ports, and status of license submissions for LNG deepwater ports.

*Liftboat III Subcommittee*. The agenda includes the following:

(1) Review and discuss previous work.

(2) Review Offshore Marine Service Association (OMSA) Liftboat Training outline.

(3) Review Final Report of answers to NOSAC Task Statement on Liftboat Licensing.

**Procedural**

The meeting is open to the public. Please note that the meeting may close early if all business is finished. At the Chair's discretion, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify the Executive Director no later than November 23, 2005. Written material for distribution at the meeting should reach the Coast Guard no later than November 23, 2005. If you would like a copy of your material distributed to each member of the committee in advance of the meeting, please submit 25 copies to the Executive Director no later than November 23, 2005.

**Information on Services for Individuals With Disabilities**

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the Executive Director as soon as possible.

Dated: September 19, 2005.

**Howard L. Hime,**

*Acting Director of Standards, Marine Safety, Security and Environmental Protection.*

[FR Doc. 05–19422 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–15–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–1603–DR]**

### Louisiana; Amendment No. 3 to Notice of a Major Disaster Declaration

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This notice amends the notice of a major disaster declaration for the State of Louisiana (FEMA–1603–DR), dated August 29, 2005, and related determinations.

**EFFECTIVE DATE:** September 21, 2005.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Vice Admiral Thad Allen, of the United States Coast Guard is appointed to act as the Federal Coordinating Officer for this declared disaster.

This action terminates my appointment of William Lokey as Federal Coordinating Officer for this disaster.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**R. David Paulison,**

*Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 05–19449 Filed 9–28–05; 8:45 am]

**BILLING CODE 9110–10–P**

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

**[FEMA–3260–EM]**

### Louisiana; Emergency and Related Determinations

**AGENCY:** Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security.

**ACTION:** Notice.

**SUMMARY:** This is a notice of the Presidential declaration of an emergency for the State of Louisiana (FEMA–3260–EM), dated September 21, 2005, and related determinations.

**EFFECTIVE DATE:** September 21, 2005.

**FOR FURTHER INFORMATION CONTACT:** Magda Ruiz, Recovery Division, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–2705.

**SUPPLEMENTARY INFORMATION:** Notice is hereby given that, in a letter dated September 21, 2005, the President declared an emergency declaration under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (the Stafford Act), as follows:

I have determined that the emergency conditions in certain areas of the State of Louisiana resulting from Hurricane Rita beginning on September 20, 2005, and continuing, are of sufficient severity and magnitude to warrant an emergency declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206 (Stafford Act). Therefore, I declare that such an emergency exists in the State of Louisiana.

You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives, protect public health and safety, and property or to lessen or avert the threat of a catastrophe in the designated areas. Specifically, you are authorized to provide emergency protective measures (Category B), including direct Federal assistance, under the Public Assistance program. This assistance excludes regular time costs for subgrantees' regular employees. In addition, you are authorized to provide such other forms of assistance under Title V of the Stafford Act as you may deem appropriate.

Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance will be limited to 75 percent of the total eligible costs. For a period of up to 72 hours, you are authorized to provide assistance for emergency protective measures, including direct Federal assistance, at 100 percent Federal funding of the total eligible costs.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes such amounts as you find necessary for Federal disaster assistance and administrative expenses.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

The Federal Emergency Management Agency (FEMA) hereby gives notice that pursuant to the authority vested in the Acting Under Secretary for Emergency Preparedness and Response, Department of Homeland Security, under Executive Order 12148, as amended, Vice Admiral Thad Allen, of the United States Coast Guard is appointed to act as the Federal Coordinating Officer for this declared emergency.

I do hereby determine the following areas of the State of Louisiana to have been affected adversely by this declared emergency:

All 64 parishes in the State of Louisiana for Public Assistance Category B (emergency protective measures), including direct Federal assistance, at 75 percent Federal funding of the total eligible costs.

For a period of up to 72 hours, assistance for emergency protective measures, including direct Federal assistance, will be provided at 100 percent Federal funding of the total eligible costs.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund Program; 97.032, Crisis Counseling; 97.033, Disaster Legal Services Program; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance; 97.048, Individuals and Households Housing; 97.049, Individuals and Households Disaster Housing Operations; 97.050, Individuals and Households Program—Other Needs; 97.036, Public Assistance Grants; 97.039, Hazard Mitigation Grant Program.)

**R. David Paulison,**

*Acting Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

[FR Doc. 05–19450 Filed 9–28–05; 8:45 am]

**BILLING CODE 9110–10–P**

## INTERNATIONAL TRADE COMMISSION

**[Investigation Nos. 701–TA–302 and 731–TA–454 (Second Review)]**

### Fresh and Chilled Atlantic Salmon From Norway

**AGENCY:** International Trade Commission.

**ACTION:** Revised schedule for the subject five-year reviews.

**DATES:** Effective September 21, 2005.

**FOR FURTHER INFORMATION CONTACT:** John Kitzmiller (202–205–3387), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

**SUPPLEMENTARY INFORMATION:** On June 20, 2005, the Commission established its schedule for the conduct of the subject five-year reviews (70 FR 36947, June 27, 2005) and subsequently revised its schedule (70 FR 51365, August 30, 2005). The Commission hereby gives notice that it is further revising the schedule for its final determinations in the subject five-year reviews.

The Commission's schedule is revised as follows: The prehearing staff report will be placed in the nonpublic record on October 21, 2005; the deadline for filing prehearing briefs is November 1, 2005; requests to appear at the hearing should be filed with the Secretary to the Commission on or before November 1, 2005; the prehearing conference will be held on November 4, 2005; the hearing will be held on November 10, 2005; posthearing briefs are due November 21, 2005; the closing of the record and final release of information is December 20, 2005; and final comments on this information are due on or before December 22, 2005.

For further information concerning these review investigations see the Commission's notices cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

**Authority:** These five-year reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: September 23, 2005.

By order of the Commission.

**Marilyn R. Abbott,**

*Secretary to the Commission.*

[FR Doc. 05–19402 Filed 9–28–05; 8:45 am]

**BILLING CODE 7020–02–U**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Air Act

Under 28 CFR 50.7, notice is hereby given that on September 13, 2005, a Consent Decree in the matter of *United States, et al.* v. *Clean Harbors Services, et al.,* Civil Action No. 05 C 5234 was lodged with the United States District Court for the Northern District of Illinois.

In a complaint that was filed simultaneously with the Consent Decree, the United States, the State of Illinois, and the State of Louisiana sought injunctive relief and penalties against ten affiliated companies of Clean Harbors Environmental Services, Inc. (''Clean Harbors''), pursuant to Sections 113(b) and 304(a) of the Clean Air Act (''CAA''), 42 U.S.C. 7413(b), 7604(a), for alleged violations of the Benzene Waste Operations National Standard for Hazardous Air Pollutants, 40 CFR 63.340 *et seq.,* (''Benzene Waste NESHAP'') occurring at facilities owned and operated by Clean Harbors at the following locations: Chicago, Illinois; Cincinnati, Ohio; Braintree, Massachusetts; Bristol, Connecticut; Baton Rouge, Louisiana; Plaquemine, Louisiana; Pa Porte, Texas; Deer Park, Texas; Kimball, Nebraska; and Aragonite, Utah.

Under the settlement, Clean Harbors, *inter alia*, will calculate benzene waste quantities at the point where the waste enters each facility; will either directly sample waste or use the highest benzene concentration value—instead of the middle value—when a generator lists a ''range'' of benzene concentrations in the waste being shipped; and will implement a sampling program for waste shipments in order to confirm the accuracy of the benzene quantities entering the facilities. Clean Harbors also will pay a civil penalty of $300,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General,

Environmental and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to the *United States, et al.* v. *Clean Harbors Services, et al.,* D.J. Ref. No. 90–5–2–1–06949.

The Consent Decree may be examined at the Office of the United States Attorney, 219 W. Dearborn St., Chicago, IL 60604, and at U.S. EPA Region 5, 77 W. Jackson St., Chicago, IL 60604. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html.* A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov),* fax number (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, pleas enclose a check in the amount of $13.00 (25 cents per page reproduction cost) payable to the U.S. Treasury.

**William D. Brighton,**

*Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–19403 Filed 9–28–05; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on September 12, 2005, a proposed Consent Decree in *United States* v. *E.I. Du Pont de Nemours and Company, et al.* Civil Action No. 1:03CV29 (and related case *E.I. Du Pont de Nemours and Company* v. *United States,* Civil Action No. 1:02CV177) was lodged with the United States District Court for Northern District of West Virginia.

In the *United States* v. *DuPont, et al.* action, the United States seeks the recovery of response costs incurred in connection with Ordinance Works Disposal Areas Superfund Site, located in Morgantown, West Virginia (Site ID number WV000850404). The United States' original complaint, filed in 2003, named only DuPont as a defendant; an amended complaint that was filed simultaneously with the proposed consent decree, adds as defendants EPEC Polymers, Inc., General Electric Company, Olin Corporation, and Rockwell Automation. In the Amended Complaint the United States alleges that each defendant owned and/or operated the Site at the time of disposal or treatment, and/or arranged for the disposal and/or treatment of wastes containing hazardous substances at the Site, within the meaning of 42 U.S.C. 9607(a).

Under the proposed consent decree EPEC Polymers, Olin Corp. and Rockwell Automation (the defendants who performed the remedial action at the Site, or the ''Performing Defendants'') will reimburse to EPA past response costs paid at the Site in the amount of $1,532,174.65, plus interest. Further, under the proposed Consent Decree, the United States, on behalf of the United States Army and other federal departments and agencies, shall: (1) Reimburse to EPA past response costs in the amount of $1,760,700.17; and (2) reimburse the Performing Defendants their past response costs in the amount of $2,420,082.80 plus interest. Additionally, under the proposed consent decree the United States, on behalf of the Settling Federal Agencies, has committed to paying EPA and the State of West Virginia 53.47% of their future response costs, and the Performing Defendants have committed to paying EPA and the State of West Virginia 46.53% of their future response costs. Because the United States, pursuant to a judicial decision, is required to indemnify DuPont for costs it incurred in connection with the Ordnance Works Site, DuPont will not be making a payment under this Decree.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to this Consent Decree in *United States* v. *DuPont, et al.* Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *DuPont, et al.,* D.J. Ref. 90–11–2–369/2.

The *United States* v. *DuPont, et al.* Consent Decree may be examined at the Office of the United States Attorney for the Northern District of West Virginia, at the Clarksburg Federal Center, 320 West Pike Street, Suite 300, Clarksburg, West Virginia 26301–2710 (ask for Alan McGonigal) and at U.S. EPA Region III's Office, 1650 Arch Street, Philadelphia, PA (ask for Andrew Goldman). During the public comment period, the *United States* v. *DuPont, et al.* consent decree, may also be examined on the following Department of Justice Web site, *http:www.usdoj.gov/enrd/open/html.* A copy of the consent decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $55.00 (25 cents per page reproduction cost) for a full copy of the consent decree, or $14.00, for a copy without signature pages, and attachments, payable to the U.S. Treasury.

**Robert Brook,**

*Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.*

[FR Doc. 05–19404 Filed 9–28–05; 8:45 am]

**BILLING CODE 4410–15–M**

## DEPARTMENT OF JUSTICE

### National Institute of Corrections

### Advisory Board Meeting

*Time and Date:* 8 a.m. to 4:30 p.m. on Monday, October 17, 2005; 8 a.m. to 12 p.m. on Tuesday, October 18, 2005.

*Place:* The Radisson Hotel, Old Town Alexandria, 901 North Fairfax Street, Alexandria, Virginia 223147.

*Status:* Open.

*Matters To Be Considered:* Mental Health Hearing and Activities; Report Mentoring Children of Prisoners; DOJ Faith Based Office; Prison Rape Elimination Act (PREA) Panel American University Project; Quarterly Report by Office of Justice Programs.

*For Further Information Contact:* Larry Solomon, Deputy Director, 202–307–3106, ext. 44254.

**Morris L. Thigpen,**

*Director.*

[FR Doc. 05–19448 Filed 9–28–05; 8:45 am]

**BILLING CODE 4410–36–M**

## NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** National Archives and Records Administration (NARA).

**ACTION:** Notice.

**SUMMARY:** NARA is giving public notice that the agency proposes to renew the information collections described in this notice, which are used in the National Historical Publications and Records Commission (NHPRC) grant program.

The public is invited to comment on the proposed information collections pursuant to the Paperwork Reduction Act of 1995.

**DATES:** Written comments must be received on or before November 28, 2005 to be assured of consideration.

**ADDRESSES:** Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740–6001; or faxed to 301–837–3213; or electronically mailed to *tamee.fechhelm@nara.gov.*

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information or copies of the proposed information collections and supporting statements should be directed to Tamee Fechhelm at telephone number 301–837–1694, or fax number 301–837–3213.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collections are necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collections; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of information technology; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collections:

1. *Title:* Application for attendance at the Institute for the Editing of Historical Documents.

*OMB number:* 3095–0012.

*Agency form number:* None.

*Type of review:* Regular.

*Affected public:* Individuals, often already working on documentary editing projects, who wish to apply to attend the annual one-week Institute for the Editing of Historical Documents, an intensive seminar in all aspects of modern documentary editing techniques taught by visiting editors and specialists.

*Estimated number of respondents:* 25.

*Estimated time per response:* 1.5 hours.

*Frequency of response:* On occasion, no more than annually (when respondent wishes to apply for attendance at the Institute).

*Estimated total annual burden hours:* 37.5 hours.

*Abstract:* The application is used by the NHPRC staff to establish the applicant's qualifications and to permit selection of those individuals best qualified to attend the Institute jointly sponsored by the NHPRC, the Wisconsin Historical Society, and the University of Wisconsin. Selected applicants' forms are forwarded to the resident advisors of the Institute, who use them to determine what areas of instruction would be most useful to the applicants.

You can also use NARA's Web site at *http://www.archives.gov/nhprc/forms/editing-application.pdf* to review and fill in the application.

2. *Title:* National Historical Publications and Records Commission Grant Program.

*OMB number:* 3095–0013.

*Agency form number:* None.

*Type of review:* Regular.

*Affected public:* Nonprofit organizations and institutions, state and local government agencies, Federally acknowledged or state-recognized Native American tribes or groups, and individuals who apply for NHPRC grants for support of historical documentary editions, archival preservation and planning projects, and other records projects.

*Estimated number of respondents:* 148 per year submit applications; approximately 100 grantees among the applicant respondents also submit semiannual narrative performance reports.

*Estimated time per response:* 54 hours per application; 2 hours per narrative report.

*Frequency of response:* On occasion for the application; semiannually for the narrative report. Currently, the NHPRC considers grant applications 2 times per year; respondents usually submit no more than one application per year.

*Estimated total annual burden hours:* 8,392 hours.

*Abstract:* The NHPRC is changing the way it provides information about its grant program. The previously all inclusive grant guidelines booklet is being replaced by a suite of announcements where the information will be specific to the grant opportunity named. The basic information collection remains the same. The grant proposal is used by the NHPRC staff, reviewers, and the Commission to determine if the applicant and proposed project are eligible for an NHPRC grant, and whether the proposed project is methodologically sound and suitable for support. The narrative report is used by the NHPRC staff to monitor the performance of grants.

You can also use NARA's Web site at *http://www.archives.gov/nhprc/guidelines/index.html* to review the guidelines. The forms used to apply for a grant can be found at *http://www.archives.gov/nhprc/forms/.*

Dated: September 23, 2005.

**Shelly L. Myers,**

*Deputy Chief Information Officer.*

[FR Doc. 05–19396 Filed 9–28–05; 8:45 am]

**BILLING CODE 7515–01–P**

## NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

### Proposed Collection, Comment Request, Youth Development Services Grant Analysis

**AGENCY:** Institute of Museum and Library Services.

**ACTION:** Notice, request for comments, collection of information.

**SUMMARY:** The Institute of Museum and Library Services as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3508(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently the Institute of Museum and Library Services is soliciting comments concerning the proposed study of museums and libraries providing youth development services under grants funded by IMLS.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the addressee section of this notice.

**DATES:** Written comments must be submitted to the office listed in the addressee section below on or before November 28, 2005. IMLS is particularly interested in comments that help the agency to:

• Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the proposed collocation of information including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

**ADDRESSES:** Send comments to: Dr. Mary Downs, Research Officer, Institute of Museum and Library Services, 1800 M St., NW., Washington, DC 20036. Telephone: 202–653–4682, Fax: 202–653–4625 or by e-mail at *mdowns@imls.gov.*

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The Institute of Museum and Library Services is an independent Federal grant-making agency authorized by the Museum and Library Services Act, Public Law 1104–208. The IMLS provides a variety of grant programs to assist the nation's museums and libraries in improving their operations and enhancing their services to the public. Museums and libraries of all sizes and types may receive support from IMLS programs. The Museum and Library Services Act of 2003 includes a strong emphasis on supporting museums and libraries to carry out their educational role as core providers of learning and in conjunction with schools, families and communities. This solicitation is to develop plans to collect information to assist IMLS in understanding the needs and trends of museums and libraries, as well as the impact and effectiveness of museum and library programs that provide services to America's youth.

**II. Current Actions**

The Institute of Museum and Library Services, in accordance with the Museum and Library Services Act of 2003, is authorized to identify needs and trends of museum and library services, report on the impact and effectiveness, and identify best practices of programs conducted with funds made available by the Institute. Current research initiatives include analysis of grants made to museums and libraries in the area of youth development services between 1997 and 2003 to identify needs, trends, and exemplary practices, and to gain an understanding of the outcomes of such grants. A survey will be undertaken to solicit information from past grantees about the results of their programs. A small number of these grantees will be interviewed by phone. These information collections will be developed based on what is needed to undertake an analysis and case studies of grant results. The information IMLS collects will build on, but not duplicate existing or ongoing collections.

*Agency:* Institute of Museum and Library Services.

*Title:* Youth Development Grants Survey.

*OMB Number:* n/a.

*Agency Number:* 3137.

*Frequency:* One time.

*Affected Public:* Museums, libraries and archives.

*Number of Respondents:* 600.

*Estimated Time Per Respondent:* 30 minutes.

*Total Burden Hours:* 300.

*Total Annualized capital/startup costs:* 0.

*Total Annual costs:* 0.

**FOR FURTHER INFORMATION CONTACT:** Dr. Mary Downs, Research Officer, Officer of Research and Technology, Institute of Museum and Library Services, 1800 M St., NW., Washington, DC 20036, e-mail: *mdowns@imls.gov* or telephone (202) 653–4682.

Dated: September 23, 2005.

**Rebecca Danvers,**

*Director, Office of Research and Technology.*

[FR Doc. 05–19423 Filed 9–28–05; 8:45 am]

**BILLING CODE 7036–01–M**

## NATIONAL INDIAN GAMING COMMISSION

### Supplemental Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Federated Indians of the Graton Rancheria Casino and Hotel Project, Sonoma, CA

**AGENCY:** National Indian Gaming Commission (NIGC).

**ACTION:** Supplemental Notice of Intent (SNOI).

**SUMMARY:** In accordance with Section 102(2)(C) of the National Environmental Policy Act (NEPA) 42 U.S.C. 4321 *et seq.*, the NIGC, in cooperation with the Federated Indians of the Graton Rancheria (the ''Graton Rancheria''), intends to gather information necessary for preparing an Environmental Impact Statement (EIS) for a proposed casino and hotel project to be located in Sonoma, California. This notice supplements the Notice of Intent (NOI) which appeared in the **Federal Register** on February 12, 2004 (69 FR 7022 (Feb. 12, 2004)) and advises the public that the NIGC and BIA intends to gather further information necessary to prepare an EIS for a proposed casino and hotel project to be located in Sonoma County, California. The purpose of the proposed action is to help address the socio-economic needs of the Federated Indians of Graton Rancheria. The proposed action is very similar to that proposed in the February 12, 2004, NOI, with the exception that the casino and hotel would be constructed adjacent to and on the east side of the previously proposed site. The shift of the proposed construction site is being considered to avoid environmental constraints discovered on the original site, particularly, to avoid wetlands identified on the original site. Additional details of the new proposed action and location are provided below in the Supplemental Information section. The supplemental scoping process will include notification of and opportunity for the general public and Federal, state, local, and tribal agencies to comment on the new proposed action. The purpose of scoping is to identify public and agency concerns on environmental issues, and alternatives to be considered in the EIS. All the information and comments gathered in response to the earlier NOI remain in the record, and there is no need to repeat information submitted at that time.

**DATES:** A public scoping meeting will be held on October 19, 2005 from 6 p.m. to 8:30 p.m., or until the last public comment is received. Written comments on the scope of the EIS should arrive by *November 4, 2005.*

**ADDRESSES:** Written comments on the scope of the EIS should be addressed to: Brad Mehaffy, NEPA Compliance Officer, National Indian Gaming Commission, 1441 L Street, NW., Suite 9100, Washington DC 20005.

Please include your name, return address, and caption: ''EIS Scoping Comments, Graton Rancheria Casino and Hotel Project'', on the first page of your written comments. The agency scoping meeting will be hosted by the NIGC and the Federated Indians of the Graton Rancheria. The public scoping meeting will also be hosted by the NIGC and the Federated Indians of the Graton Rancheria. The public scoping meeting will be held at the Spreckels Performing

Arts Center, Nellie W. Codding Theatre, 5409 Snyder Lane, Rohnert Park, CA 94928.

**FOR FURTHER INFORMATION CONTACT:** For general information on the NEPA review procedures or status of the NEPA review, contact Brad Mehaffy, NIGC NEPA Compliance Officer, 202–632–7003.

**SUPPLEMENTARY INFORMATION:** The proposed federal action is the NIGC's approval of a gaming management contract between the Federated Indians of Graton Rancheria and SC Sonoma Management LLC. The approval of the gaming management contract would result in the development of a resort hotel, casino, and supporting facilities. The facility will be managed by SC Sonoma Management LLC on behalf of the Federated Indians of Graton Rancheria, pursuant to the terms of a gaming management contract.

A NOI was originally published on February 12, 2004 for an EIS to analyze the approval of a management contract between the Federated Indians of Graton Rancheria and SC Sonoma Management LLC. Preparation of the EIS commenced after a 46-day scoping period, during which 768 public comments were received both in writing and orally at a scoping meeting held on March 10, 2004. As displayed in a handout at the March 2004 scoping meeting, development of a casino and hotel resort was proposed on a 363 acre site bordered by Wilfred Avenue to the north; Stony Point Road to the west; Rohnert Park Expressway, farmland, and the Laguna de Santa Rosa to the south; and a mobile home park, a business park, and farmland to the east.

During preparation of the EIS, numerous environmental constraints to development of this location were discovered, including wetlands, endangered species, and the 100-year floodplain. Therefore, in an effort to minimize environmental effects, a new project site is proposed which includes approximately 180 acres within the southern portion of the original 360-acre site along with an approximately 73-acre property located adjacent to the eastern boundary of the previously proposed site. The new property is bounded to the north by Wilfred Avenue and rural residential parcels, to the east by farmland, to the west by Langner Avenue, and to the south by Business Park Drive and light industrial development. The previously proposed sites will remain as alternatives in the EIS. The proposed action consists of approval of a gaming management contract between the Federated Indians of Graton Rancheria and SC Sonoma Management LLC. Approval of this contract would result in development of a casino and hotel resort on the new 253-acre site, assuming this alternative is selected at the conclusion of the EIS process.

Nearby land uses include agricultural uses such as livestock grazing and dairy operations, rural residential uses, industrial and commercial development, and open space. In addition to the proposed action, a reasonable range of alternatives, including a no action alternative, will be analyzed in the EIS. These alternatives are expected to include, but are not limited to: (1) A casino and hotel in the northwest corner of the original site, (2) a casino and hotel in the northeast corner of the original site, (3) a reduced intensity alternative, (4) an alternative use, (5) an additional off-site location, and (6) no action. Areas of environmental concern to be addressed in the EIS include: Land use, geology and soils, water resources, agricultural resources, biological resources, cultural resources, mineral resources, paleontological resources, traffic and transportation, noise, air quality, public health/environmental hazards, public services, and utilities, hazardous waste and materials, socioeconomics, environmental justice, and visual resources/aesthetics. The list of issues and alternatives may be expanded based on comments received during the scoping process.

The Federated Indians of Graton Rancheria is a Federally recognized Indian tribe with approximately 1082 members. It is governed by a tribal council, consisting of seven members, under a constitution that was passed by vote of the members on December 14, 2002 and approved by the Secretary of the Interior on December 23, 2002. The Federated Indians of Graton Rancheria presently has no land in trust with the U.S. Government and is eligible to acquire land for reservation purposes to be placed in trust.

The NIGC will serve as lead agency for compliance with NEPA. The Bureau of Indian Affairs, U.S. Army Corps of Engineers, and Sonoma County will serve as Cooperating Agencies.

*Public Comment and Solicitation:* Written comments pertaining to the proposed action will be accepted throughout the EIS planning process. However, to ensure proper consideration in preparation of the draft EIS, scoping comments should be received by November 4, 2005. The draft EIS is planned for publication and distribution in early 2006.

Individual commenters may request confidentiality. If you wish us to withhold your name and/or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. Anonymous comments will not, however, be considered. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

**Authority:** This notice is published in accordance with Sections 1501.7, 1506.6, and 1508.22 of the Council of Environmental Quality Regulations 40 CFR, Parts 1500 through 1508 implementing the procedural requirements of the NEPA of 1969, as amended 42 U.S.C. 4371 *et seq.*, and the BIA NEPA Handbook.

Dated: September 21, 2005.

**Philip N. Hogen,**

*Chairman.*

[FR Doc. 05–19429 Filed 9–28–05; 8:45 am]

**BILLING CODE 7565–01–P**

## NATIONAL MEDIATION BOARD

### Submission for OMB Review; Comment Request

**AGENCY:** National Mediation Board (NMB).

**SUMMARY:** The Director, Office of Administration, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments within 30 days from the date of this publication.

**SUPPLEMENTARY INFORMATION:** Section 3506 of the Paperwork Reduction Act of 1995 (U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Director, Office of Administration, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection contains the following: (1) Type of review requested, *e.g.* new, revision

extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Record keeping burden. OMB invites public comment.

Currently, the National Mediation Board is soliciting comments concerning the proposed extension of the Application for Investigation of Representation Dispute and is interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the agency; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the agency enhance the quality, utility, and clarity of the information to be collected; and (5) how might the agency minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: September 26, 2005.

**June D. W. King,**

*Director, Office of Administration, National Mediation Board.*

**Application for Investigation of Representation Dispute**

*Type of Review:* Extension.

*Title:* Application for Investigation of Representation Dispute.

*OMB Number:* 3140–0001 .

*Frequency:* On occasion.

*Affected Public:* Carrier and Union Officials, and employees of railroads and airlines.

*Reporting and Recordkeeping Hour Burden:*

*Responses:* 68 annually.

*Burden Hours:* 17.00.

*Abstract:* When a dispute arises among a carrier's employees as to who will be their bargaining representative, the National Mediation Board (NMB) is required by Section 2, Ninth, to investigate the dispute, to determine who is the authorized representative, if any, and to certify such representative. The NMB's duties do not arise until its services have been invoked by a party to the dispute. The Railway Labor Act is silent as to how the invocation of a representation dispute is to be accomplished and the NMB has not promulgated regulations requiring any specific vehicle. Nonetheless, 29 CFR 1203.2, provides that applications for the services of the NMB under Section 2, Ninth, to investigate representation disputes may be made on printed forms secured from the NMB's Office of Legal Affairs or on the Internet at *http://www.nmb.gov/representation/rapply.html.* The application requires the following information: the name of the carrier involved; the name or description of the craft or class involved; the name of the petitioning organization or individual; the name of the organization currently representing the employees, if any; the names of any other organizations or representatives involved in the dispute; and the estimated number of employees in the craft or class involved. This basic information is essential in providing the NMB with the details of the dispute so that it can determine what resources will be required to conduct an investigation.

The extension of this form is necessary considering the information is used by the Board in determining such matters as how many staff will be required to conduct an investigation and what other resources must be mobilized to complete our statutory responsibilities. Without this information, the Board would have to delay the commencement of the investigation, which is contrary to the intent of the Railway Labor Act.

Requests for copies of the proposed information collection request may be accessed from *http://www.nmb.gov* or should be addressed to Denise Murdock, NMB, 1301 K Street NW., Suite 250 E, Washington, DC 20005 or addressed to the e-mail address *murdock@nmb.gov* or faxed to 202–692–5081. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to June D. W. King at 202–692–5010 or via Internet address *king@nmb.gov*. Individuals who use a telecommunications device for the deaf (TDD/TDY) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 05–19482 Filed 9–28–05; 8:45 am]

**BILLING CODE 7550–01–P**

## NUCLEAR REGULATORY COMMISSION

**[Docket No. 50–184]**

### National Institute of Standards and Technology, National Bureau of Standards Reactor; Notice of Intent To Prepare an Environmental Impact Statement and Conduct Scoping Process

The National Institute of Standards and Technology (NIST), formerly known as the National Bureau of Standards, has submitted an application for renewal of Facility Operating License No. TR–5 for an additional 20 years of operation at the National Bureau of Standards Reactor (NBSR). The NBSR is located in Montgomery County in Maryland, about 20 miles northwest of Washington, DC. The operating license for the NBSR expired on May 16, 2004. The application for license renewal, which included an environmental report (ER), was received on April 9, 2004. A notice of receipt and availability of the application was published in the **Federal Register** on May 12, 2004 (69 FR 26414). A notice of acceptance for docketing of the application and a notice of opportunity for hearing regarding renewal of the facility operating licenses was published in the **Federal Register** on September 21, 2004 (69 FR 56462). The purpose of this notice is to inform the public that the U.S. Nuclear Regulatory Commission (NRC) will be preparing an environmental impact statement (EIS) in support of the review of the license renewal application and to provide the public an opportunity to participate in the environmental scoping process, as defined in 10 CFR 51.29. In addition, as outlined in 36 CFR 800.8, ''Coordination with the National Environmental Policy Act,'' the NRC plans to coordinate compliance with Section 106 of the National Historic Preservation Act in meeting the requirements of the National Environmental Policy Act of 1969 (NEPA).

In accordance with 10 CFR 50.20 and 10 CFR 51.45, NIST submitted the ER as part of the application. The ER was prepared pursuant to 10 CFR part 51 and is available for public inspection at the NRC Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, or from the Publicly Available Records component of NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible at *http://www.nrc.gov/reading-rm/adams.html*, which provides access through the NRC's Electronic Reading Room link. Persons who do not have access to ADAMS, or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, or (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

This notice advises the public that the NRC intends to gather the information necessary to prepare an EIS documenting the staff's environmental review of the application for renewal of the NBSR operating license for an additional 20 years. Alternatives to the proposed action (license renewal), including the no-action alternative will be considered. The NRC is required by

10 CFR 51.20(b)(2) to prepare an EIS in connection with the renewal of the operating license for a testing facility. This notice is being published in accordance with NEPA and the NRC's regulations found in 10 CFR part 51.

The NRC will first conduct a scoping process for the EIS and, as soon as practicable thereafter, will prepare a draft EIS for public comment. Participation in the scoping process by members of the public and local, State, tribal, and Federal government agencies is encouraged. The scoping process for the EIS will be used to accomplish the following:

a. Define the proposed action which is to be the subject of the EIS;

b. Determine the scope of the EIS and identify the significant issues to be analyzed in depth;

c. Identify and eliminate from detailed study those issues that are peripheral or that are not significant;

d. Identify any environmental assessments and other EISs that are being or will be prepared that are related to, but are not part of the scope of the EIS being considered;

e. Identify other environmental review and consultation requirements related to the proposed action;

f. Indicate the relationship between the timing of the preparation of the environmental analyses and the Commission's tentative planning and decisionmaking schedule;

g. Identify any cooperating agencies and, as appropriate, allocate assignments for preparation and schedules for completing the EIS to the NRC and any cooperating agencies; and

h. Describe how the EIS will be prepared, and include any contractor assistance to be used.

The NRC invites the following entities to participate in scoping:

a. The applicant, the National Institute of Standards and Technology;

b. Any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved, or that is authorized to develop and enforce relevant environmental standards;

c. Affected State and local government agencies, including those authorized to develop and enforce relevant environmental standards;

d. Any affected Indian tribe;

e. Any person who requests or has requested an opportunity to participate in the scoping process; and

f. Any person who has petitioned or intends to petition for leave to intervene.

Members of the public may send written comments on the environmental scope of the NBSR license renewal review to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mailstop T–6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Comments may also be delivered to the NRC, Room T–6D59, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland, from 7:30 a.m. to 4:15 p.m. during Federal workdays. To be considered in the scoping process, written comments should be postmarked no later than 60 days after the date of this Notice. Electronic comments may be sent by e-mail to the NRC at *NBSReactorEIS@nrc.gov* and should be sent no later than 60 days from the date of this Notice, to be considered in the scoping process. No public scoping meeting is planned. Comments will be available electronically and accessible through ADAMS at *http://www.nrc.gov/reading-rm/adams.html*. Participation in the scoping process for the EIS does not entitle participants to become parties to the proceeding to which the EIS relates. Notice of opportunity for a hearing regarding the renewal application was the subject of the aforementioned **Federal Register** notice (69 FR 56462).

At the conclusion of the scoping process, the NRC will prepare a concise summary of the determination and conclusions reached, including the significant issues identified, and will send a copy of the summary to each participant in the scoping process. The summary will also be available for inspection in ADAMS at *http://www.nrc.gov/reading-rm/adams.html*. The staff will then prepare and issue for comment the draft EIS, which will be the subject of a separate notice. Copies will be available for public inspection at the above-mentioned addresses, and one copy per request will be provided free of charge. After receipt and consideration of the comments, the NRC will prepare a final EIS, which will also be available for public inspection.

Information about the proposed action, the EIS, and the scoping process may be obtained from NRC Environmental Project Manager, Mr. James H. Wilson, at (301) 415–1108, or via e-mail at *jhw1@nrc.gov*.

Dated at Rockville, Maryland, this 23rd day of September 2005.

For the Nuclear Regulatory Commission.

**Brian E. Thomas,**

*Section Chief, Research and Test Reactors Section, New, Research and Test Reactors Program, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.*

[FR Doc. E5–5316 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards; Procedures for Meetings

#### Background

This notice describes procedures to be followed with respect to meetings conducted by the Nuclear Regulatory Commission's (NRC's) Advisory Committee on Reactor Safeguards (ACRS) pursuant to the Federal Advisory Committee Act (FACA). These procedures are set forth so that they may be incorporated by reference in future notices for individual meetings.

The ACRS is a statutory group established by Congress to review and report on nuclear safety matters and applications for the licensing of nuclear facilities. The Committee's reports become a part of the public record.

The ACRS meetings are conducted in accordance with FACA; they are normally open to the public and provide opportunities for oral or written statements from members of the public to be considered as part of the Committee's information gathering process. ACRS reviews do not normally encompass matters pertaining to environmental impacts other than those related to radiological safety.

The ACRS meetings are not adjudicatory hearings such as those conducted by the NRC's Atomic Safety and Licensing Board Panel as part of the Commission's licensing process.

#### General Rules Regarding ACRS Full Committee Meetings

An agenda will be published in the **Federal Register** for each full Committee meeting. There may be a need to make changes to the agenda to facilitate the conduct of the meeting. The Chairman of the Committee is empowered to conduct the meeting in a manner that, in his/her judgment, will facilitate the orderly conduct of business, including making provisions to continue the discussion of matters not completed on the scheduled day on another meeting day. Persons planning to attend the meeting may contact the Designated Federal Official (DFO) specified in the **Federal Register** Notice

prior to the meeting to be advised of any changes to the agenda that may have occurred.

The following requirements shall apply to public participation in ACRS full Committee meetings:

(a) Persons who plan to make oral statements and/or submit written comments at the meeting should provide 35 copies to the DFO at the beginning of the meeting. Persons who cannot attend the meeting but wish to submit written comments regarding the agenda items may do so by sending a readily reproducible copy addressed to the DFO specified in the **Federal Register** Notice, care of the Advisory Committee on Reactor Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Comments should be limited to items being considered by the Committee. Comments should be in the possession of the DFO five days prior to the meeting to allow time for reproduction and distribution.

(b) Persons desiring to make oral statements at the meeting should make a request to do so to the DFO. If possible, the request should be made five days before the meeting, identifying the topic(s) on which oral statements will be made and the amount of time needed for presentation so that orderly arrangements can be made. The Committee will hear oral statements on topics being reviewed at an appropriate time during the meeting as scheduled by the Chairman.

(c) Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the DFO.

(d) The use of still, motion picture, and television cameras will be permitted at the discretion of the Chairman and subject to the condition that the use of such equipment will not interfere with the conduct of the meeting. The DFO will have to be notified prior to the meeting and will authorize the use of such equipment after consultation with the Chairman. The use of such equipment will be restricted as is necessary to protect proprietary or privileged information that may be in documents, folders, etc., in the meeting room. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

(e) A transcript will be kept for certain open portions of the meeting and will be available in the NRC Public Document Room (PDR), One White Flint North, Room O–1F21, 11555 Rockville Pike, Rockville, MD 20852–2738. A copy of the certified minutes of the meeting will be available at the same location three months following the meeting. Copies may be obtained upon payment of appropriate reproduction charges. ACRS meeting agenda, transcripts, and letter reports are available through the NRC Public Document Room at *pdr@nrc.gov*, by calling the PDR at 1–800–394–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/* (ACRS & ACNW Mtg schedules/agendas).

(f) Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service for observing ACRS meetings should contact Mr. Theron Brown, ACRS Audio Visual Technician, (301) 415–8066 between 7:30 a.m. and 3:45 p.m. eastern time at least 10 days before the meeting to ensure the availability of this service.

Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

**ACRS Subcommittee Meetings**

In accordance with the revised FACA, the agency is no longer required to apply the FACA requirements to meetings conducted by the Subcommittees of the NRC Advisory Committees, if the Subcommittee's recommendations would be independently reviewed by its parent Committee.

The ACRS, however, chose to conduct its Subcommittee meetings in accordance with the procedures noted above for ACRS full Committee meetings, as appropriate, to facilitate public participation, and to provide a forum for stakeholders to express their views on regulatory matters being considered by the ACRS. When Subcommittee meetings are held at locations other than at NRC facilities, reproduction facilities may not be available at a reasonable cost. Accordingly, 50 copies of the materials to be used during the meeting should be provided for distribution at such meetings.

**Special Provisions When Proprietary Sessions Are To Be Held**

If it is necessary to hold closed sessions for the purpose of discussing matters involving proprietary information, persons with agreements permitting access to such information may attend those portions of the ACRS meetings where this material is being discussed upon confirmation that such agreements are effective and related to the material being discussed. The DFO should be informed of such an agreement at least five working days prior to the meeting so that it can be confirmed, and a determination can be made regarding the applicability of the agreement to the material that will be discussed during the meeting. The minimum information provided should include information regarding the date of the agreement, the scope of material included in the agreement, the project or projects involved, and the names and titles of the persons signing the agreement. Additional information may be requested to identify the specific agreement involved. A copy of the executed agreement should be provided to the DFO prior to the beginning of the meeting for admittance to the closed session.

Dated: September 23, 2005.

**Annette Vietti-Cook,**

*Secretary of the Commission.*

[FR Doc. E5–5317 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Advisory Committee on Reactor Safeguards Meeting of the Subcommittee on Digital Instrumentation and Control Systems; Notice of Meeting

The ACRS Subcommittee on Digital Instrumentation and Control Systems will hold a meeting on October 20–21, 2005, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance, with the exception of a portion that will be closed on Thursday, October 20, 2005, 8:30 a.m. until 12:30 p.m. to discuss safeguards information pursuant to 5 U.S.C. 552b(c)(3).

The agenda for the subject meeting shall be as follows:

Thursday, October 20, 2005—8:30 a.m. until the close of business

Friday, October 21, 2005—8:30 a.m. until the close of business

The purpose of the meeting is to review selected digital instrumentation and control research projects and related matters. The Subcommittee will hear presentations by and hold discussions with representatives of the Office of Nuclear Regulatory Research

and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official, Mr. Eric A. Thornsbury (telephone (301) 415–8716), five days prior to the meeting, if possible, so that appropriate arrangements can be made. Electronic recordings will be permitted.

Further information regarding this meeting can be obtained by contacting the Designated Federal Official or the Cognizant Staff Engineer between 7:30 a.m. and 4:15 p.m. (ET). Persons planning to attend this meeting are urged to contact one of the above named individuals at least two working days prior to the meeting to be advised of any potential changes to the agenda.

Dated: September 21, 2005.

**Michael R. Snodderly,**

*Acting Chief, ACRS/ACNW.*

[FR Doc. E5–5318 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Final Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued a revision to an existing guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 33 of Regulatory Guide 1.84, ''Design, Fabrication, and Materials Code Case Acceptability, ASME Section III,'' lists the NRC-approved Code Cases from Section III, ''Rules for Construction of Nuclear Power Plant Components,'' of the Boiler and Pressure Vessel (BPV) Code promulgated by the American Society of Mechanical Engineers (ASME). In so doing, this guide identifies the Code Cases that nuclear power plant applicants and licensees can use to comply with the NRC's requirements in Title 10, Section 50.55a(c), of the *Code of Federal Regulations* [10 CFR 50.55a(c)], ''Reactor Coolant Pressure Boundary.'' Specifically, 10 CFR 50.55a(c) requires, in part, that components of the reactor coolant pressure boundary must be designed, fabricated, erected, and tested in accordance with the ASME Section III requirements for Class 1 components (or equivalent quality standards). The ASME publishes a new edition of the BPV Code (which includes Section III) every 3 years, new addenda every year, and Code Cases every quarter.

Revision 33 of Regulatory Guide 1.84 identifies the Code Cases that the NRC has determined to be acceptable alternatives to applicable provisions of Section III. For this revision, the NRC staff reviewed Section III Code Cases listed in Supplement 12 to the 1998 Edition of the ASME BPV Code through Supplement 6 to the 2001 Edition.

The newly approved Code Cases and revisions to existing Code Cases will be incorporated by reference into 10 CFR 50.55a(b), which identifies the latest editions and addenda of Section III that the NRC has approved for use. Code Cases approved by the NRC may be used voluntarily by licensees as an alternative to compliance with ASME Code provisions that have been incorporated by reference into 10 CFR 50.55a(b). Section III Code Cases not yet endorsed by the NRC may be implemented through 10 CFR 50.55a(a)(3), which permits the use of alternatives to the Code requirements referenced in 10 CFR 50.55a, provided that the proposed alternatives result in an acceptable level of quality and safety, and their use is authorized by the Director of the NRC's Office of Nuclear Reactor Regulation.

On August 3, 2004, the NRC staff published a draft of this guide as Draft Regulatory Guide DG–1124. Following the closure of the public comment period on September 2, 2004, the staff considered all stakeholder comments in the course of preparing Revision 33 of Regulatory Guide 1.84.

The NRC staff encourages and welcomes comments and suggestions in connection with improvements to published regulatory guides, as well as items for inclusion in regulatory guides that are currently being developed. You may submit comments by any of the following methods.

Mail comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand-deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about Revision 33 of Regulatory Guide 1.84 may be directed to Wallace E. Norris, at (301) 415–6796 or *WEN@nrc.gov*.

Regulatory guides are available for inspection or downloading through the NRC's public Web site in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/*. Electronic copies of Revision 33 of Regulatory Guide 1.84 are also available in the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html*, under Accession #ML052130562. Note, however, that the NRC has temporarily suspended public access to ADAMS so that the agency can complete security reviews of publicly available documents and remove potentially sensitive information. Please check the NRC's Web site for updates concerning the resumption of public access to ADAMS.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland; the PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by email to *PDR@nrc.gov*. Requests for single copies of draft or final guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by email to *DISTRIBUTION@nrc.gov*; or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

Regulatory guides are not copyrighted, and Commission approval is not required to reproduce them.

(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 15th day of August, 2005.

For the U.S. Nuclear Regulatory Commission,

**Carl J. Paperiello,**

*Director, Office of Nuclear Regulatory Research.*

[FR Doc. 05–19444 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Final Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued a revision to an existing guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 1 of Regulatory Guide 1.193, ''ASME Code Cases Not Approved for Use,'' lists the Code Cases that the NRC has determined are not acceptable for generic use as specified in Section III, ''Rules for Construction of Nuclear Power Plant Components,'' and Section XI, ''Rules for Inservice Inspection of Nuclear Power Plant Components,'' of the Boiler and Pressure Vessel (BPV) Code promulgated by the American Society of Mechanical Engineers (ASME). (In so doing, this guide complements Revision 33 of Regulatory Guide 1.84, ''Design, Fabrication, and Materials Code Case Acceptability, ASME Section III,'' and Revision 14 of Regulatory Guide 1.147, ''Inservice Inspection Code Case Acceptability, ASME Section XI, Division 1,'' which list the Code Cases that the NRC has determined to be acceptable alternatives to applicable provisions of Section III and Section XI, respectively.)

Licensees may request NRC approval to implement one or more of the Code Cases listed in Revision 1 of Regulatory Guide 1.193, as provided in 10 CFR 50.55a(a)(3), which permits the use of alternatives to the Code requirements referenced in 10 CFR 50.55a, provided that the proposed alternatives result in an acceptable level of quality and safety. To do so, a licensee must submit a plant-specific request that addresses the NRC's concern about the given Code Case.

On August 3, 2004, the NRC staff published a draft of this guide as Draft Regulatory Guide DG–1126. Following the closure of the public comment period on September 2, 2004, the staff considered all stakeholder comments in the course of preparing Revision 1 of Regulatory Guide 1.193.

The NRC staff encourages and welcomes comments and suggestions in connection with improvements to published regulatory guides, as well as items for inclusion in regulatory guides that are currently being developed. You may submit comments by any of the following methods.

Mail comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand-deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about Revision 1 of Regulatory Guide 1.193 may be directed to Wallace E. Norris, at (301) 415–6796 or *WEN@nrc.gov.*

Regulatory guides are available for inspection or downloading through the NRC's public Web site in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/.* Electronic copies of Revision 1 of Regulatory Guide 1.193 are also available in the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html,* under Accession #ML052140501. Note, however, that the NRC has temporarily suspended public access to ADAMS so that the agency can complete security reviews of publicly available documents and remove potentially sensitive information. Please check the NRC's Web site for updates concerning the resumption of public access to ADAMS.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland; the PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov.* Requests for single copies of draft or final guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by e-mail to *DISTRIBUTION@nrc.gov;* or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

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(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 15th day of August, 2005.

For the U.S. Nuclear Regulatory Commission.

**Carl J. Paperiello,**

*Director, Office of Nuclear Regulatory Research.*

[FR Doc. 05–19445 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Final Regulatory Guide: Issuance, Availability

The U.S. Nuclear Regulatory Commission (NRC) has issued a revision to an existing guide in the agency's Regulatory Guide Series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

Revision 14 of Regulatory Guide 1.147, ''Inservice Inspection Code Case Acceptability, ASME Section XI, Division 1,'' lists the NRC-approved Code Cases from Section XI, ''Rules for Inservice Inspection of Nuclear Power Plant Components,'' of the Boiler and Pressure Vessel (BPV) Code promulgated by the American Society of Mechanical Engineers (ASME). In so doing, this guide identifies the Code Cases that nuclear power plant applicants and licensees can use to comply with the NRC's requirements in Title 10, Section 50.55a(g), of the *Code of Federal Regulations* [10 CFR 50.55a(g)], ''Inservice Inspection Requirements.'' Specifically, 10 CFR 50.55a(g) requires, in part, that Class 1, 2, 3, MC, and CC components and their supports must meet the requirements of ASME Section XI (or equivalent quality standards). The ASME publishes a new edition of the BPV Code (which includes Section XI) every 3 years, new

addenda every year, and Code Cases every quarter.

Revision 14 of Regulatory Guide 1.147 identifies the Code Cases that the NRC has determined to be acceptable alternatives to applicable provisions of Section XI. For this revision, the NRC staff reviewed Section XI Code Cases listed in Supplement 12 to the 1998 Edition of the ASME BPV Code through Supplement 6 to the 2001 Edition.

The newly approved Code Cases and revisions to existing Code Cases will be incorporated by reference into 10 CFR 50.55a(b), which identifies the latest editions and addenda of Section XI that the NRC has approved for use. Code Cases approved by the NRC may be used voluntarily by licensees without a request for NRC authorization, provided that they are used with any identified limitations or modifications. Section XI Code Cases not yet endorsed by the NRC may be implemented through 10 CFR 50.55a(a)(3), which permits the use of alternatives to the Code requirements referenced in 10 CFR 50.55a, provided that the proposed alternatives result in an acceptable level of quality and safety, and their use is authorized by the Director of the NRC's Office of Nuclear Reactor Regulation.

On August 3, 2004, the NRC staff published a draft of this guide as Draft Regulatory Guide DG–1125. Following the closure of the public comment period on September 2, 2004, the staff considered all stakeholder comments in the course of preparing Revision 14 of Regulatory Guide 1.147.

The NRC staff encourages and welcomes comments and suggestions in connection with improvements to published regulatory guides, as well as items for inclusion in regulatory guides that are currently being developed. You may submit comments by any of the following methods.

Mail comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

Hand-deliver comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Fax comments to: Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission at (301) 415–5144.

Requests for technical information about Revision 14 of Regulatory Guide 1.147 may be directed to Wallace E. Norris, at (301) 415–6796 or *WEN@nrc.gov*.

Regulatory guides are available for inspection or downloading through the NRC's public Web site in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/*. Electronic copies of Revision 14 of Regulatory Guide 1.147 are also available in the NRC's Agencywide Documents Access and Management System (ADAMS) at *http://www.nrc.gov/reading-rm/adams.html,* under Accession #ML052510117. Note, however, that the NRC has temporarily suspended public access to ADAMS so that the agency can complete security reviews of publicly available documents and remove potentially sensitive information. Please check the NRC's Web site for updates concerning the resumption of public access to ADAMS.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland; the PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4205, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov*. Requests for single copies of draft or final guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Reproduction and Distribution Services Section; by e-mail to *DISTRIBUTION@nrc.gov;* or by fax to (301) 415–2289. Telephone requests cannot be accommodated.

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(5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 15th day of August, 2005.

For the U.S. Nuclear Regulatory Commission,

**Carl J. Paperiello,**

*Director, Office of Nuclear Regulatory Research.*

[FR Doc. 05–19446 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## NUCLEAR REGULATORY COMMISSION

### Draft Report for Comment: Office of Nuclear Material Safety and Safeguards Consolidated Decommissioning Guidance: Updates To Implement the License Termination Rule Analysis

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Notice of availability and request for comments.

**SUMMARY:** The U.S. Nuclear Regulatory Commission's (NRC) Office of Nuclear Material Safety and Safeguards (NMSS) has issued NUREG–1757, Supplement 1, ''Consolidated NMSS Decommissioning Guidance: Updates to Implement the License Termination Rule Analysis, Draft Report for Comment'' for public comment.

**DATES:** Comments on this draft document should be submitted by December 30, 2005. Comments received after that date will be considered, if it is practical to do so.

**ADDRESSES:** NUREG–1757, Supplement 1, is available for inspection and copying for a fee at the Commission's Public Document Room, NRC's Headquarters Building, 11555 Rockville Pike (First Floor), Rockville, Maryland. The Public Document Room is open from 7:45 a.m. to 4:15 p.m., Monday through Friday, except on Federal holidays. NUREG–1757 is also available electronically on the NRC Web site at: *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1757/s1/*, and from the ADAMS Electronic Reading Room on the NRC Web site at: *http://www.nrc.gov/reading-rm/adams.html.*

Members of the public are invited and encouraged to submit written comments. Comments may be accompanied by additional relevant information or supporting data. A number of methods may be used to submit comments. Written comments should be mailed to Chief, Rules Review and Directives Branch, U.S. Nuclear Regulatory Commission, Mail Stop T6–D59, Washington, DC 20555–0001. Hand-deliver comments to: 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m., Federal workdays. Comments may be submitted electronically to the NRC staff by the Internet at: *decomcomments@nrc.gov*. Comments also may be submitted electronically through the comment form available on the NRC Web site at: *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1757/s1/*.

Please specify the report number NUREG–1757, Supplement 1, draft, in

your comments, and send your comments by December 30, 2005.

**FOR FURTHER INFORMATION, CONTACT:** Duane W. Schmidt, Mail Stop T–7E18, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: (301) 415–6919; Internet: *dws2@nrc.gov*.

**SUPPLEMENTARY INFORMATION:** In September 2003, the NRC published a three-volume NUREG report, NUREG–1757, ''Consolidated NMSS Decommissioning Guidance.'' That report provides guidance on: planning and implementing license termination under the License Termination Rule, in 10 CFR part 20, subpart E; complying with the radiological criteria for license termination; and complying with the requirements for financial assurance and recordkeeping for decommissioning and timeliness in decommissioning materials facilities. The draft Supplement 1, ''Consolidated NMSS Decommissioning Guidance: Updates to Implement the License Termination Rule Analysis'' (NUREG–1757, Supplement 1), is the first of periodic updates to reflect current NRC decommissioning policy.

Draft Supplement 1 provides proposed additions and updates to guidance addressing the following issues, which were explored in an NRC staff analysis of the implementation of the License Termination Rule: restricted use and institutional controls; on-site disposal of radioactive materials; scenario justification based on reasonably foreseeable land use; intentional mixing of contaminated soil; and removal of material after license termination. It also provides new and revised guidance to address several other issues. NRC is seeking public comment in order to receive feedback from the widest range of interested parties and to ensure that all information relevant to developing the document is available to the NRC staff. The NRC will review public comments received on the draft document. Suggested changes will be incorporated, where appropriate, and a final document will be issued for use. When finalized, the guidance is intended for use by NRC staff, licensees, and the public.

Draft Supplement 1 is issued for comment only and is not intended for interim use.

Dated at Rockville, MD, this 23rd day of September, 2005.

For the Nuclear Regulatory Commission.

**Andrew Persinko,**

*Acting Deputy Director, Decommissioning Directorate, Division of Waste Management and Environmental Protection, Office of Nuclear Material Safety and Safeguards.*

[FR Doc. 05–19447 Filed 9–28–05; 8:45 am]

**BILLING CODE 7590–01–P**

## PRESIDIO TRUST

### Notice of Public Meeting

**AGENCY:** The Presidio Trust.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with §103(c)(6) of the Presidio Trust Act, 16 U.S.C. 460bb note, Title I of Pub. L. 104–333, 110 Stat. 4097, as amended, and in accordance with the Presidio Trust's bylaws, notice is hereby given that a public meeting of the Presidio Trust Board of Directors will be held commencing 6:30 p.m. on Thursday, October 20, 2005, at the Herbst International Exhibition Hall, 385 Moraga Avenue, Presidio of San Francisco, California. The Presidio Trust was created by Congress in 1996 to manage approximately eighty percent of the former U.S. Army base known as the Presidio, in San Francisco, California.

The purposes of this meeting are to provide an Executive Director's Report, to provide an overview of projects and plans for fiscal year 2006, and to receive public comment in accordance with the Trust's Public Outreach Policy.

Accommodation: Individuals requiring special accommodation at this meeting, such as needing a sign language interpreter, should contact Mollie Matull at (415) 561–5300 prior to October 14, 2005.

**FOR FURTHER INFORMATION CONTACT:** Karen Cook, General Counsel, the Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, California 94129–0052, Telephone: (415) 561–5300.

Dated: September 23, 2005.

**Karen A. Cook,**

*General Counsel.*

[FR Doc. 05–19433 Filed 9–28–05; 8:45 am]

**BILLING CODE 4310–4R–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52493; File No. SR–Amex–2005–087]**

### Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise Its Options Transaction Fees

September 22, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 31, 2005, the American Stock Exchange LLC (''Amex'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. Amex has designated the proposed rule change as one establishing or changing a due, fee, or other charge imposed by Amex pursuant to Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex proposes to: (i) Increase transaction fees for customer and firm orders on index options from the current rate of $0.22 per contract side to $0.45 per contract side; (ii) eliminate the fee exception for machine delivered index option orders of less than 30 contracts; (iii) adopt transaction fees of $0.15 per contract side in connection with customer orders for options on trust issued receipts (''TIRs'') and exchange-traded funds (''ETFs''); and (iv) adopt options licensing fees for firm, non-member market maker, and broker-dealer orders.

The text of the proposed rule change is available on Amex's Web site (*http://www.amex.com*), at Amex's principal office, and from the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Amex proposes to amend its Options Fee Schedule to adopt and/or increase certain transaction fees applicable to index options, ETF options, and TIR options. The fee changes proposed in this rule filing will be effective September 1, 2005. The Exchange, for the purpose of clarity and ease of reference, has also added additional references to specific option types throughout its Options Fee Schedule. The types of options set forth in the Options Fee Schedule now will include Equity Options, Exchange-Traded Fund Share Options (excluding QQQQ Options), QQQQ Options, Trust Issued Receipt (HOLDR) Options, Index Options (in some cases, excluding MNX and NDX Options), and MNX and NDX Options.[5]

Amex currently charges transaction fees for customer and firm orders in index options executed on the Exchange at the total rate of $0.22 per contract side. The Exchange proposes to increase total transaction fees to $0.45 per contract side[6] for customer and firm index option orders executed on the Exchange, with the exception of MNX and NDX options, which will remain at the current total rate of $0.22 per contract side. In addition, the Exchange also proposes to eliminate the fee exception in which machine-delivered index option orders of less than 30 contracts are not subject to transaction fees. This change will provide that all index option orders executed on the Exchange will be subject to transaction fees.

The transaction fees in connection with ETF and TIR options transactions are currently provided under the category ''Equity Options,'' set forth in the Options Fee Schedule.[7] As a result, customer orders are not charged transaction fees. The one exception is that customer orders are charged a $0.15 options transaction fee in the iShares S&P 100 Index Fund option. Amex is proposing to levy a transaction fee on customer orders of TIR and ETF options (excluding QQQQ options) at a total rate of $0.15 per contract side.[8] In order to remain competitive with the other options exchanges, the Exchange will continue not to charge a transaction fee on customer QQQQ option orders.

Currently, the Exchange does not charge firm, non-member market maker, or broker-dealer orders a fee for transactions in certain licensed options products. The Exchange proposes to levy an options licensing fee on these orders consistent with the licensing fee currently assessed on orders of specialists and registered options traders. The proposed fee varies from $0.05 per contract side to $0.20 per contract side, depending upon the particular index-based product that is subject to a license agreement. These fees are set forth in the Options Licensing Fee section of the Options Fee Schedule.

2. Statutory Basis

The Exchange believes that the proposed fee change is consistent with the requirements of Section 6(b) of the Act,[9] in general, and Section 6(b)(4) of the Act,[10] in particular, regarding the equitable allocation of reasonable dues, fees, and other charges among Exchange members and other persons using Exchange facilities.

The Exchange asserts that the proposed increase in transaction fees for index, ETF, and TIR options is equitable as required by Section 6(b)(4) of the Act.[11] In connection with the proposed increase in the index option transaction fee for customer and firm orders, the Exchange notes that the proposal will better align its index option fees with its competitors. Customer orders will now also be charged $0.15 per contract side in connection with ETF and TIR options instead of not being subject to transaction fees. The Exchange believes that this is reasonable and equitable given the fact that the orders of other market participants are subject to transaction charges. The Exchange also maintains that charging an options licensing fee, where applicable, to all market participant orders except for customer orders is reasonable given the competitive pressures in the industry.

The Exchange further believes that eliminating the fee exception for machine-delivered index option orders of less than 30 contracts is equitable and fair since all index option orders will now be potentially subject to transaction charges regardless of the size of the order. In the past, the Exchange and certain market participants have largely subsidized the cost of providing index options. The Exchange now seeks to better align these fees with the cost of providing these products, maintaining the trading floor and systems, and generating revenue to fund Exchange operations.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(ii) of the Act[12] and Rule 19b–4(f)(2) thereunder,[13] because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors,

[5] Currently, the Options Fee Schedule lists equity options, index options, and options on the S&P 100 iShares.

[6] The $0.45 per contract side charge would consist of an options transaction fee of $0.38 per contract side, an options comparison fee of $0.04 per contract side, and an options floor brokerage fee of $0.03 per contract side.

[7] As set forth above, ETF and TIR options will now be separately listed in the Options Fee Schedule.

[8] The $0.15 per contract side charge would consist of an options transaction fee of $0.08 per contract side, an options comparison fee of $0.04 per contract side, and an options floor brokerage fee of $0.03 per contract side.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] Section 6(b)(4) states that the rules of a national securities exchange must provide for ''the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.'' 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Amex–2005–087 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–Amex–2005–087. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Amex–2005–087 and should be submitted on or before October 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 05–19495 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52494; File No. SR–CBOE–2005–70]**

## Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend a Pilot Program Relating to Market-Maker Access to the Hybrid Automatic Execution System

September 22, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 12, 2005, the Chicago Board Options Exchange, Incorporated (''CBOE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as ''non-controversial'' pursuant to Section 19(b)(3)(A) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to extend the pilot program in CBOE Rule 6.13 relating to market-maker access to the Exchange's automatic execution system until October 12, 2006. No other changes are being made to the pilot program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

In 2004, the Commission approved on a pilot basis, CBOE Rule 6.13(b)(i)(C)(iii) (''Rule'') relating to the frequency with which certain market participants could submit orders for execution through the Exchange's Hybrid Trading System (''Hybrid'').[6] CBOE Rule 6.13(b)(i)(C)(iii) currently provides in relevant part:

(iii) 15-Second Limitation: With respect to orders eligible for submission pursuant to paragraph (b)(i)(C)(ii), members shall neither enter nor permit the entry of multiple orders on the same side of the market in an option class within any 15-second period for an account or accounts of the same beneficial owner. The appropriate FPC may shorten the duration of this 15-second period by providing notice to the membership via a Regulatory Circular that is issued at least one day prior to implementation. The effectiveness of this rule shall terminate on October 12, 2005.

Upon approval of the Rule, the Exchange began allowing orders from options exchange market-makers to be eligible for automatic execution subject to the 15-second limitation described above.[7] As the pilot period expires on

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] The Exchange asked the Commission to waive the five business day pre-filing notice requirement. *See* Rule 19b–4(f)(6)(iii), 17 CFR 240.19b–4(f)(6)(iii). The Commission is exercising its authority to waive the five business day pre-filing notice requirement and notes that the Exchange provided the Commission with four business days' notice.

[6] See Securities Exchange Act Release No. 50005 (July 12, 2004), 69 FR 43032 (July 19, 2004) (SR–CBOE–2004–33). The pilot program has been extended once. *See* Securities Exchange Act Release No. 51030 (January 12, 2005), 70 FR 3404 (January 24, 2005) (SR–CBOE–2004–91) (extension of the pilot program until October 12, 2005).

[7] CBOE Rule 6.13(b)(i)(C)(ii) governs the submission of orders from market-makers (paragraph (C)(ii)(A)) and stock exchange specialists (paragraph (C)(ii)(B)). It should be noted that, pursuant CBOE Rule 6.13(b)(i)(C)(iii), the floor procedures committees (FPCs) determined to shorten to 5 seconds (from 15 seconds) the period

Continued

October 12, 2005, the Exchange proposes to extend the pilot program. Given the success of the pilot program in attracting market-maker volume to the Exchange, the Exchange proposes to extend the pilot program's duration an additional year, until October 12, 2006.

2. Statutory Basis

The Exchange believes that the extension of the pilot program will allow the Exchange to continue to provide auto-ex access to all market-makers. Accordingly, the Exchange believes the proposed rule change is consistent with the Act[8] and the rules and regulations under the Act applicable to a national securities exchange and, in particular, the requirements of Section 6(b) of the Act.[9] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[10] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and, in general, to protect investors and the public interest.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange neither solicited nor received comments on the proposal.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2005–70 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–CBOE–2005–70. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2005–70 and should be submitted on or before October 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 05–19498 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

required between entry of multiple market-maker orders (including non-CBOE market-maker orders) on the same side of the market in an option class for an account or accounts of the same beneficial owner using Hybrid. This change went into effect on July 18, 2005 and was announced to the membership via Regulatory Circular RG05–61.

[8] 15 U.S.C. 78a *et seq.*

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52496, File No. SR–MSRB–2005–12]**

## Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Approving Proposed Rule Change Concerning Solicitation and Coordination of Payments to Political Parties and Question and Answer Guidance on Supervisory Procedures Related to Rule G–37(d) on Indirect Violations

September 22, 2005.

On June 27, 2005, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change consisting of an amendment to Rule G–37(c), concerning solicitation and coordination of payments to political parties, and Q&A guidance on supervisory procedures related to Rule G–37(d), on indirect violations. The proposed rule change was published for comment in the **Federal Register** on August 16, 2005.[3] The Commission received four comment letters regarding the proposal.[4] On September 16, 2005,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 52235 (August 10, 2005) 70 FR 48214 (August 16, 2005) (the ''Commission's Notice'').

[4] *See* letter to Jonathan G. Katz, Secretary, Commission, from Terry L. Atkinson, Managing Director, UBS Financial Services Inc. (''UBS''), dated September 1, 2005 (''UBS' Letter''); letter to Jonathan G. Katz, Secretary, Commission, from Leslie M. Norwood, Vice President and Assistant General Counsel, The Bond Market Association (''BMA''), dated September 2, 2005 (''BMA's Letter''); letter to Jonathan G. Katz, Secretary, Commission, from Marc E. Elias and Rebecca H. Gordon, Perkins Coie, Counsel to the Democratic Senatorial Campaign Committee (''DSCC''), dated September 6, 2005 (''DSCC's Letter''); and letter to Jonathan G. Katz, Secretary, Commission, from David M. Thompson, President, and Robert J.

the MSRB filed a response to the comment letters from UBS, BMA and DSCC.[5] On September 21, 2005, the MSRB filed a response to the comment letter from Griffin, Kubik.[6] This order approves the proposed rule change.

The proposed rule change would prohibit a dealer and certain municipal finance professionals (''MFPs'') from soliciting any person or PAC to make or coordinate a payment to a political party of a state or locality where the dealer is engaging or is seeking to engage in municipal securities business. In addition, the proposed Qs&As seek to provide dealers with more guidance as they develop procedures to ensure compliance with both the language and the spirit of Rule G–37. A full description of the proposal is contained in the Commission's Notice.

UBS, BMA and Griffin, Kubik stated in their comment letters that they fully support the elimination of pay-to-play practices in the municipal securities industry, but raised concerns about implementation of the proposal. DSCC expressed concern that the guidance presented in the MSRB's proposed Questions and Answers may unnecessarily chill contributions to national party committees from MFPs and dealer-controlled PACs.

**Vagueness and First Amendment Concerns**

Both UBS and BMA stated that the proposed Qs&As are vague and do not provide clear, uniform standards as to when a contribution to a PAC or party committee results in an indirect violation. UBS and BMA also stated that the Qs&As represent an expansion of Rule G–37 because the Qs&As require that a broker-dealer have procedures in place to reasonably ensure that contributions to PACs and party committees do not result in indirect contributions to issuer officials, but provide no discernable standard as to when such indirect contribution would occur. BMA stated that the MSRB had previously established a safe harbor where a broker-dealer gets assurances from a party committee or PAC that the broker-dealer's contribution will not be used for issuer officials (*e.g.*, for housekeeping or conference accounts), and that this safe harbor conflicted with the proposal. Both UBS and BMA stated that the vagueness of the proposal will allow different firms to develop different supervisory procedures depending on their tolerance for risk. UBS and BMA further stated that creating a vague standard for contributing to PACs and party committees is unconstitutional, and that the due diligence suggested by the proposed Qs&As is troublesome under the First Amendment. Griffin, Kubik stated that they believe that Rule G–37 is unconstitutional.

The MSRB noted in its Response Letters that the commentators raised these concerns to the MSRB during its comment period on the proposed guidance, that the MSRB responded to these comments in its filing and that the Commission's Notice addresses these issues at some length. The MSRB stated that the proposed Qs&As do not extend the reach of Rule G–37 or create a vague standard of regulation. The MSRB stated that the proposed guidance does not change the standard regarding when a payment to a political party or PAC could result in either a rule violation or a ban on doing business with a municipal issuer. The MSRB further stated that a violation of Rule G–37(d) still will only occur when the payment is made to other entities ''as a means to circumvent the rule,'' and that the standard enunciated in Rule G–37(d), which prohibits anyone from ''directly or indirectly, through or by any other person or means'' doing what sections (b) and (c) prohibit, is not unconstitutionally vague.

The MSRB further stated that contrary to statements made in the commentators' letters, this precise issue raised before the United States Court of Appeals in *Blount* v. *SEC,*[7] and that the Court of Appeals in *Blount* directly rejected the challenge that Rule G–37(d) was too broad and could not regulate payments to parties and PACs when they are *intended* as end-runs around the direct contribution limits. In *Blount,* the Court stated: ''Although the language of section (d) itself is very broad, the SEC has interpreted it as requiring a showing of culpable intent, that is, a demonstration that the conduct was undertaken 'as a means to circumvent' the requirements of (b) and (c) * * * The SEC states its 'means to circumvent' qualification in general terms. The qualification appears, therefore, to apply not only to such items as contributions made by the broker's or dealer's family members or employees, but also gifts by a broker to a state or national party committee, made with the knowledge that some part of the gift is likely to be transmitted to an official excluded by Rule G–37. In short, according to the SEC, the rule restricts such gifts and contributions only when they are intended as end-runs around the direct contribution limitations.'' [8]

The MSRB further stated that the cases cited by BMA related to different issues and did not discredit the *Blount* Court's ruling on this precise issue. In addition, the MSRB stated that the cases relied upon by BMA were decided prior to *Blount* as well as the Supreme Court's decision in *McConnell.*[9] Griffin, Kubik stated that the MSRB's citations to *Blount* and *McConnell* were weak arguments, but did not cite any authority for their belief that Rule G–37 is unconstitutional.

The MSRB stated in its filing that it was issuing the proposed guidance to remind dealers of the need to have adequate supervisory procedures. The MSRB guidance makes suggestions concerning such procedures but does not require particular procedures. The MSRB stated that it is up to individual dealers to create procedures that are appropriate to their particular circumstances, and that broker-dealers generally do not have uniform supervisory procedures.

The MSRB stated that it never intended for dealers to treat payments to administrative party accounts as a safe harbor and that payments to administrative-type accounts have always fallen within the rule's regulatory ambit. The MSRB further stated that the SEC's approval order of certain early amendments to Rule G–37 clearly demonstrates that the MSRB never intended for dealers to treat payments to administrative party accounts as a safe harbor.[10]

In 1995, the MSRB filed and the SEC approved amendments to Rule G–37's disclosure requirements to require dealers to record and report all *payments* to parties by dealers, PACs,

Stracks, Counsel, Griffin, Kubik, Stephens & Thompson, Inc. (''Griffin, Kubik''), dated August 29, 2005 (''Griffin, Kubik's Letter'').

[5] *See* letter from Carolyn Walsh, Senior Associate General Counsel, MSRB, to Martha M. Haines, Chief, Office of Municipal Securities, Commission, dated September 16, 2005 (''MSRB's First Response Letter'').

[6] *See* letter from Carolyn Walsh, Senior Associate General Counsel, MSRB, to Martha M. Haines, Chief, Office of Municipal Securities, Commission, dated September 21, 2005 (''MSRB's Second Response Letter''). Griffin, Kubik's Letter was provided to the MSRB after it had sent its First Response Letter.

[7] *Blount* v. *SEC,* 61 F.3d 938 (D.C. Cir 1995), *rehearing and suggestion for rehearing en banc denied* (1995), *certiorari denied by* 517 U.S. 1119, 116 S.Ct. 1351, 134 L.Ed.2d 520 (1996).

[8] *Id.,* at 948.

[9] *McConnell* v. *Federal Election Commission,* 540 U.S. 93, 124 S.Ct. 619 (Dec. 10, 2003).

[10] *See* Securities Exchange Act Release No. 35446 (SEC Order Approving Proposed Rule Change by the Municipal Securities Rulemaking Board Relating to Rule G–37 on Political Contributions and Prohibitions on Municipal Securities Business, and Rule G–8, on Recordkeeping) (March 6, 1995), 60 FR 13496 (''1995 SEC Approval Order'').

MFPs and executive officers regardless of whether those payments constitute *contributions.* In the 1995 SEC Approval Order, the SEC reiterated that the party payment disclosure requirements are intended to help ensure that dealers do not circumvent the prohibition on business in the rule by indirect contributions to issuer officials through payments to political parties. The SEC explained that the need for the language amendment was motivated by attempts by dealer and/or political parties to assert that contributions to administrative-type accounts did not fall within the rule's regulatory ambit. In the 1995 SEC Approval Order, the SEC states: ''Certain dealers and other industry participants have notified the MSRB that certain political parties currently are engaging in fundraising practices which, according to these political parties, do not invoke the application of rule G–37. For example, some of these entities currently are urging dealers to make payments to political parties earmarked for expenses other than political contributions (such as administrative expenses or voter registration drives). Since these payments would not constitute 'contributions' under the rule, the recordkeeping and reporting provisions would not apply. The MSRB is concerned, based upon this information, that the same pay-to-play pressures that motivated the MSRB to adopt rule G–37 may be emerging in connection with the fundraising practices of certain political parties described above.''[11]

In addition, in August 2003, when the MSRB published a notice on indirect rule violations of Rule G–37, the MSRB referenced the 1995 SEC Approval Order and specifically stated that, ''The party payment disclosure requirements were intended to assist in severing any connection between payments to political parties (*even if earmarked for expenses other than political contributions*) and the awarding of municipal securities business.'' [12]

The MSRB further stated that the commentators continued incorrect assertions about a ''housekeeping'' safe harbor only serve to illustrate the potential for real (or imagined) safe harbors to become dangerous loopholes as parties or PACs tailor their solicitations for contributions to the safe harbor's parameters, and that, as noted in the MSRB's proposed guidance, the need for dealers to adopt adequate written supervisory procedures to prevent indirect violations via ''housekeeping'' type political party accounts is especially important in light of media and other reports that issuer agents have informed dealers and MFPs that, if they are prohibited from contributing directly to an issuer official's campaign, they should contribute to an affiliate party's ''housekeeping'' account.

**National Party Committees and Federal Leadership PACs**

UBS and BMA requested that the MSRB expressly state that contributions made to a national party committee or federal leadership PAC be permitted under the proposed Qs&As as long as (1) the contribution was not solicited by an issuer official, and (2) the party committee or leadership PAC is not controlled by an issuer official. The DSCC stated that it is concerned that the guidance presented in the MSRB's draft Questions and Answers may unnecessarily chill contributions to national party committees from MFPs and dealer-controlled PACs, and that contributions to national party committees do not present the ''pay-to-play'' concerns Rule G–37 was intended to address. These commentators are asking the MSRB to create a safe harbor for certain national party committees and federal leadership PACs.

The MSRB responded that there is no evidence that the lack of a safe harbor for national party committees and federal leadership PACs has inhibited MFPs or dealers from contributing to such parties or PACs. The MSRB does not believe it is useful to provide ''safe harbors'' concerning parties or PACs such that a dealer or MFP could make payments to certain parties or PACs without investigating whether the payment is actually being made as a means to circumvent the requirements of Rule G–37. The MSRB stated that the Court of Appeals in *Blount* [13] expressly recognized that Rule G–37(d) was originally intended to prevent payments to both *national* and state parties used as a ''means to circumvent'' Rule G–37. UBS and BMA stated that when a contribution is not solicited by an issuer official and the party leadership PAC is not controlled by an issuer official the national party committees and federal leadership PACs cannot be used as a means to circumvent Rule G–37; the MSRB stated that such a position is inconsistent with public perception. The MSRB also stated that the Supreme Court's recent decision in *McConnell* [14] emphasized the potential for payments to a political party to have undue influence on the actions of the elected officeholders belonging to the same party, and that *McConnell* upheld new federal statutory restrictions on soft money donations that were neither solicited by candidates nor used by the party to aid specific candidates. Given public perception and the Supreme Court's pronouncements, the MSRB believes it is reasonable to require dealers to be responsible for having adequate supervisory procedures that obligate the dealer to exercise its judgment concerning whether contributions to any party or PAC are being made as a means to circumvent the provisions of Rule G–37.

**The Prohibition on Soliciting Contributions to State and Local Party Committees Should be Symmetrical to the Contributions Ban**

UBS stated that the Rule G–37(c) amendment should be symmetrical to the contributions ban because it is illogical to impose a greater prohibition on soliciting contributions than on making contributions. The MSRB responded that the proposed rule amendment is more limited than as portrayed by UBS. UBS stated that the amendment would completely prohibit MFPs from soliciting contributions to any state and local party committees when, in fact, it only prohibits solicitations by the dealer or certain MFPs for contributions to a political party of a state of locality where the dealer is engaging or is seeking to engage in municipal securities business. Thus, the MSRB believes that the proposed amendment is narrowly tailored to regulate only a dealer's or certain MFP's solicitation of other persons' payments to political parties when there can be a perception that MFPs and dealers are soliciting others to make payments to parties or PACs as a means to circumvent the rule and the rule's disclosure requirements.

The MSRB determined that allowing dealers or certain MFPs to solicit other persons to make political party or PAC payments in states and localities where they are engaging or seeking to engage in municipal securities business creates at least the appearance of attempting to influence the awarding of municipal securities business through such payments. Moreover, without the proposed prohibition, it would be very difficult for enforcement agencies to detect such potential indirect violations because the parties solicited do not have to disclose the payments. Additionally, the MSRB believes that the arguably stricter prohibition can be justified because a violation of Rule G–37(c) does

[11] *Id.* at 13498.

[12] MSRB Notice 2003–32 (August 6, 2003) at pp. 1–2 (emphasis added).

[13] *See supra* note 7.

[14] *See supra* note 9.

not result in an automatic ban on business.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB [15] and, in particular, the requirements of Section 15B(b)(2)(C) of the Act and the rules and regulations thereunder.[16] Section 15B(b)(2)(C) of the Act requires, among other things, that the MSRB's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.[17] In particular, the Commission finds that the proposed rule change is consistent with the Act because it will help inhibit practices that attempt, or create the appearance of attempting, to influence the awarding of municipal securities business through an indirect violation of Rule G–37. The Commission also finds that the Q&A guidance will facilitate dealer compliance with Rule G–27, on supervision, and Rule G–37(d)'s prohibitions on indirect rule violations.

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[18] that the proposed rule change (SR–MSRB–2005–12) be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 05–19497 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

[15] In approving this rule the Commission notes that it has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78o–4(b)(2)(C).

[17] *Id.*

[18] 15 U.S.C. 78s(b)(2).

[19] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52488; File No. SR–MSRB–2005–14]**

## Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendment to Rule A–8(a), on Adoption of Proposed Rules and Submission to Commission

September 21, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 12, 2005, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board''), filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the MSRB. The MSRB has filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB is filing with the Commission a proposed rule change consisting of an amendment to Rule A–8(a), on adoption of proposed rules and submission to Commission. The text of the proposed rule change is available on the MSRB's Web site (*http://www.msrb.org*), at the MSRB's principal office, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

In November 2004, the SEC's Electronic Form 19b–4 Filing System became operative. Self-regulatory organizations are required to use this electronic filing system for submitting rule filings to the SEC instead of submitting paper filings. As part of the process for using this electronic filing system, the person submitting the filing is required to ''sign'' the filing with an electronic signature and such signature is associated with a particular computer. Due to the procedural steps involved in submitting filings to the SEC through its electronic system, the MSRB is revising Rule A–8(a) to delete the Chairman of the Board from the list of persons authorized to sign rule filings. Thus, rule filings will be signed by one of the staff members designated by the Board to perform this function.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(I) of the Act,[5] which authorizes the MSRB to adopt rules that provide for the operation and administration of the MSRB. The proposed rule change is concerned solely with the operation and administration of the MSRB.

*B. Self-Regulatory Organization's Statement on Burden on Competition*

The MSRB does not believe that the proposed rule change will result in any burden on competition not necessary or appropriate in furtherance of the purposes of the Act since it only applies to the operation and administration of the MSRB.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [6] and Rule 19b–4(f)(3) thereunder.[7] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily

[5] 15 U.S.C. 78o–4(b)(2)(I).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(3).

abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[8]

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–MSRB–2005–14 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–MSRB–2005–14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2005–14 and should be submitted on or before October 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. E5–5312 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

[8] *See* Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52489; File No. SR–NASD–2005–108]**

## Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Rename The Nasdaq SmallCap Market

September 21, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 8, 2005, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, The Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(3) thereunder,[4] as one concerned solely with the administration of Nasdaq, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change**

Nasdaq proposes to rename the Nasdaq SmallCap Market as the Nasdaq Capital Market. Nasdaq will implement the proposed rule change at the time of issuance of a press release announcing the change, to be issued not later than three weeks after the date of this filing.

The text of the proposed rule change is available on Nasdaq's Web site (*http://www.nasdaq.com*), at NASD's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(3).

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, Nasdaq included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

Nasdaq proposes to rename the Nasdaq SmallCap Market as the Nasdaq Capital Market to better reflect the wide range of issuers eligible to list on that tier.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[5] in general and with Section 15A(b)(6) of the Act,[6] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Nasdaq believes that changing the name to the Nasdaq Capital Market from the Nasdaq SmallCap Market will help market participants by clarifying that issuers of a wide range of capitalization sizes may list on that market.[7]

*B. Self-Regulatory Organization's Statement on Burden on Competition*

Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not

[5] 15 U.S.C. 78*o*–3.

[6] 15 U.S.C. 78*o*–3(b)(6).

[7] The Commission has made a minor technical change to this notice with Nasdaq's consent. *See* memorandum re telephone conversation between Katherine A. England, Assistant Director, Joseph P. Morra, Special Counsel, Jan Woo, Attorney, Division of Market Regulation, Commission, and Arnold Golub, Associate Vice President, Nasdaq, dated September 16, 2005.

necessary or appropriate in furtherance of the purposes of the Act, as amended.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(iii) [8] of the Act and subparagraph (f)(3) of Rule 19b–4 thereunder [9] because it is concerned solely with the administration of Nasdaq. At any time within 60 days of the filing of a rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2005–108 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASD–2005–108. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2005–108 and should be submitted on or before October 20, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. E5–5313 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

[8] 15 U.S.C. 78s(b)(3)(A)(iii).

[9] 17 CFR 240.19b–4(f)(3).

[10] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52497; File No. SR–PCX–2005–90]**

## Self-Regulatory Organizations; Pacific Exchange, Inc.; Order Granting Approval of Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 to the Proposed Rule Change To Amend the Certificate of Incorporation of PCX Holdings, Inc., PCX Rules, and the Bylaws of Archipelago Holdings, Inc. in Relation to the Acquisition of PCX Holdings by Archipelago Holdings

September 22, 2005.

**I. Introduction**

On August 1, 2005, the Pacific Exchange, Inc. (''PCX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, as amended (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the certificate of incorporation of PCX Holdings, Inc. (''PCXH''), the PCX rules, and the bylaws of Archipelago Holdings, Inc. (''Archipelago'') in relation to the acquisition of PCXH by Archipelago. On August 10, 2005, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on August 18, 2005.[3] The Commission received one comment on the proposal.[4] On September 16, 2005, the Exchange filed Amendment No. 2 (''Amendment No. 2'') to the proposed rule change.[5] This order approves the proposed rule change, grants accelerated approval to Amendment No. 2 to the proposed rule change, and solicits comments from interested persons on Amendment No. 2.

**II. Description of the Proposal**

On January 3, 2005, PCXH, Archipelago and New Apple Acquisitions Corporation (''Merger Sub''), a newly formed wholly owned subsidiary of Archipelago, entered into an Agreement and Plan of Merger,[6]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 52249 (August 12, 2005), 70 FR 48611 (''Notice'').

[4] *See* electronic mail sent to the Division of Enforcement and the Division of Market Regulation on September 13, 2005 from ''A Concerned Stakeholder.''

[5] In Amendment No. 2, the Exchange: (1) Revised its Form 19b–4 to reflect actions by the stockholders of PCXH approving the Merger Agreement (as defined below) on September 13, 2005, thereby completing the last necessary corporate action; (2) made certain technical, non-substantive corrections to the text of the proposed rule change; (3) clarified the scope of the term ''real-time market surveillance'' in its discussion of the scope of the regulatory agreement between PCX and NASD pursuant to Rule 17d–2 under the Act; (4) clarified the relationship between Archipelago and Wave Securities, L.L.C. (''Wave''); Archipelago and Terra Nova Trading, L.L.C. (''Terra Nova''); Terra Nova and TAL Financial Services, LLC (''TAL''); and Archipelago and White Cap Trading LLC (''White Cap'') in relation to its requests for exceptions from PCXH's ownership and voting limitations included in the Notice; (5) provided that the temporary exception it requested for Wave in the Notice would be subject to a condition that Archipelago continue to maintain and comply with its existing information barriers; (6) included a request for a temporary exception from the PCXH ownership and voting requirements for the ''inbound routing'' function of its wholly owned subsidiary Archipelago Trading Services, Inc. (''Arca Trading'') and the related clearing function performed by Archipelago Securities, L.L.C. (''Archipelago Securities''), subject to certain conditions; (7) requested an exception on a 60-day pilot basis for Archipelago to continue to own and operate an alternative trading system (''ATS'') for the trading of over-the-counter bulletin board securities not traded on any exchange; (8) requested an exception on a pilot basis until the earlier of (a) 60 days and (b) the closing of the pending merger between Archipelago and the New York Stock Exchange, Inc. (''NYSE'') for Archipelago to be able to continue to own and operate, through Archipelago Securities, a service that provides direct connectivity to the NYSE through DOT access; and (9) requested accelerated approval of Amendment No. 2.

[6] On July 22, 2005, PCXH, Archipelago and Merger Sub amended and restated the Original

Continued

pursuant to which Archipelago agreed to acquire PCXH and all of PCXH's wholly owned subsidiaries, including PCX and PCX's equities business subsidiary, PCX Equities, Inc. (''PCXE''), by way of a merger under Delaware law of the Merger Sub with and into PCXH, with PCXH as the surviving corporation (the ''Merger'').[7] The purpose of the proposed rule change is to amend the certificate of incorporation of PCXH (''Certificate of Incorporation of PCXH''), certain rules of the PCX, and the bylaws of Archipelago (''Archipelago Bylaws'') to facilitate the consummation of the Merger.

*A. Corporate Structure and Governance*

PCXH, as the surviving corporation in the Merger, will become a direct, wholly owned subsidiary of Archipelago (the post-Merger PCXH is referred to herein as the ''New PCXH''). The Certificate of Incorporation of PCXH as in effect immediately prior to the Effective Time will be amended pursuant to the Merger Agreement, as described in this proposed rule change, and as so amended will be the certificate of incorporation of the New PCXH. The bylaws of PCXH as in effect immediately prior to the Effective Time will be the bylaws of the New PCXH. The directors of the Merger Sub at the Effective Time will become directors of the New PCXH and the officers of PCXH at the Effective Time will become officers of the New PCXH.

As represented by PCX in the Notice, except as described in the Notice or otherwise approved by the Commission, the Merger will not affect the internal corporate structure of PCXH or the regulatory relationship of PCX and PCXE to Archipelago Exchange, L.L.C. (''ArcaEx''), the exclusive equities trading facility of PCX and PCXE. PCX will remain a wholly owned subsidiary of the New PCXH, will continue operating the options business of the Exchange, and will retain the self-regulatory organization responsibility for the options business and for PCX's equities business subsidiary, PCXE. ArcaEx will remain the exclusive equities trading facility of PCX and PCXE and the Amended and Restated Facility Services Agreement among Archipelago, PCX and PCXE, dated as of March 22, 2002, which currently governs the regulatory relationship of PCX and PCXE to ArcaEx (the ''FSA''), will remain in full force and effect in its current form. Except as otherwise discussed herein, PCXE's operations, governance structure, or rules will not be affected by the Merger. After the Merger, the board of directors of PCX and PCXE will continue to meet the compositional requirements set forth in the certificate of incorporation and bylaws of PCX and PCXE.

*B. Self-Regulatory Function of PCX and Regulatory Jurisdiction Over Archipelago*

Certain provisions of Archipelago's current certificate of incorporation (''Certificate of Incorporation of Archipelago'') are designed to facilitate the ability of PCX, PCXE, and the Commission to fulfill their regulatory and oversight obligations under the Act.[8] All but one of these provisions remain applicable only for so long as ArcaEx remains a facility (as defined in Section 3(a)(2) of the Act)[9] of PCX and PCXE and the FSA remains in full force and effect. PCX represents that following completion of the Merger, ArcaEx will remain the exclusive equities trading facility of PCX and PCXE, and the FSA will remain in full force and effect in its current form. In order to assure, however, the continued force and effect of these provisions in the event of any change in the relationship of PCX and PCXE to ArcaEx or the effectiveness of the FSA after completion of the Merger, PCX proposes to amend the Archipelago Bylaws to provide that Archipelago will not take any action, and will not permit any of its subsidiaries (which will include PCXH, PCX, and PCXE, as well as ArcaEx) to take any action that will cause (i) ArcaEx to cease to be a facility of PCX and PCXE, or (ii) the FSA to cease to be in full force and effect, unless each provision in the Certificate of Incorporation of Archipelago that is subject to the limitation described above is amended to provide that such provision shall remain in full force and effect whether or not ArcaEx remains a facility of PCX and PCXE or the FSA is in full force and effect.[10]

In addition, certain provisions of the current Certificate of Incorporation of Archipelago apply only to the extent that their requirements relate to ArcaEx.[11] Following completion of the Merger, PCX and PCXE will become wholly owned subsidiaries of Archipelago. To also apply these provisions to the operations of PCX and PCXE, PCX proposes to amend the Archipelago Bylaws to provide that:[12]

- Archipelago's books and records shall be subject at all times to inspection and copying by PCX and PCXE to the extent such books and records are related to the operation and administration of PCX or PCXE; [13]
- Archipelago shall take reasonable steps necessary to cause its agents to cooperate with PCX and PCXE pursuant to their regulatory authority with

Merger Agreement (the agreement, as so amended, is referred to herein as the ''Merger Agreement'').

[7] The closing of the Merger is referred to herein as the ''Effective Time'' of the Merger.

[8] *See* Sections IV.A and IV.D of Securities Exchange Act Release No. 50170 (August 9, 2004), 69 FR 50419 (August 16, 2004) (order approving a proposed rule change in connection with the initial public offering of Archipelago) (''August 2004 Order''). These provisions include paragraphs (C)(3)(y), (D)(2), (D)(2)(a) and (H)(3) of Article Fourth, the third paragraph of Article EIGHTH, the penultimate paragraph of Article TENTH, and Articles THIRTEENTH, FOURTEENTH, FIFTEENTH, SIXTEENTH, SEVENTEENTH, EIGHTEENTH and NINETEENTH of the Certificate of Incorporation of Archipelago. *See also* Section 6.8(b) of the Archipelago Bylaws.

[9] 15 U.S.C. 78c(a)(2).

[10] Archipelago Bylaws, Proposed Section 6.8(c). The foregoing bylaw provision may not be amended, modified or repealed unless such amendment, modification or repeal is (i) filed with and approved by the Commission or (ii) approved by Archipelago stockholders voting not less than 80% of the then outstanding votes entitled to be cast in favor of any such amendment, modification or repeal. Archipelago Bylaws, Proposed Section 6.8(g). In addition, the Archipelago Bylaws will continue to provide that before any amendment to the bylaws shall be effective, such amendment shall be submitted to the Board of Directors of PCX and if such Board shall determine that the same is required, under Section 19 of the Act and the rules promulgated thereunder, to be filed with, or filed with and approved by, the Commission before such amendment may be effective under Section 19 of the Act and the rules promulgated thereunder, then such amendment shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. Archipelago Bylaws, Proposed Section 6.8(b).

PCX also proposes to amend Section 6.8(b) of the Archipelago Bylaws to eliminate the restriction that the provision applies only for so long as ArcaEx remains a facility of PCX and PCXE and the FSA is in full force and effect.

[11] Certificate of Incorporation of Archipelago, Article THIRTEENTH (relating to the submission by Archipelago and its officers, directors, and certain employees to the jurisdiction of the United States federal courts, the Commission, and PCX for matters arising out of or relating to the activities of ArcaEx); Article FOURTEENTH (providing for the inspection and copying by PCX and PCXE of Archipelago's books and records as they relate to the operation and administration of ArcaEx as a facility of PCX and PCXE); Article SEVENTEENTH (requiring Archipelago to take reasonable steps necessary to cause its agents to cooperate with PCX and PCXE with respect to such agents' activities related to ArcaEx); and Article EIGHTEENTH (requiring that Archipelago cause its officers, directors, and employees to consent to the applicability to them of certain provisions of the Certificate of Incorporation of Archipelago in connection with their activities related to ArcaEx).

[12] The following proposed bylaw provisions may not be amended, modified or repealed unless such amendment, modification or repeal is (i) filed with and approved by the Commission or (ii) approved by Archipelago stockholders voting not less than 80% of the then outstanding votes entitled to be cast in favor of any such amendment, modification or repeal. Archipelago Bylaws, Proposed Section 6.8(g).

[13] Archipelago Bylaws, Proposed Section 6.8(e)(i).

respect to such agents' activities related to PCX or PCXE; [14]

• Archipelago shall take reasonable steps necessary to cause its officers, directors and employees prior to accepting a position as an officer, director or employee, as applicable, of Archipelago to consent in writing to the applicability to them of certain specified provisions of the Certificate of Incorporation of Archipelago with respect to their activities related to PCX or PCXE; [15] and

• Archipelago, its directors and officers, and those of its employees whose principal place of business and residence is outside the United States, shall be deemed to irrevocably submit to the exclusive jurisdiction of the United States Federal courts, the Commission and PCX for the purposes of any suit, action or proceeding pursuant to the United States Federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, the activities of PCX or PCXE, and Archipelago and each such director, officer or employee, in the case of any such director, officer or employee by virtue of his acceptance of any such position, shall be deemed to waive, and agree not to assert by way of motion, as a defense or otherwise in any suit, action or proceeding, any claims that it or they are not personally subject to the jurisdiction of the Commission, that the suit, action or proceeding is an inconvenient forum or that the venue of the suit, action or proceeding is improper, or that the subject matter thereof may not be enforced in or by such courts or agency.[16]

In addition, Archipelago represents in the Notice that, prior to the earlier of (1) the 2006 annual general meeting of Archipelago stockholders and (2) the first meeting of Archipelago stockholders to occur after the closing of the Merger (other than any meeting or meetings of Archipelago stockholders convened for the purpose of considering and approving the merger of Archipelago and the NYSE), that its board of directors will: (a) Propose amendments to the Certificate of Incorporation of Archipelago to (i) extend the application of voting and ownership limitations imposed on ETP Holders currently contained in the Certificate of Incorporation of Archipelago to OTP Holders and OTP Firms; (ii) delete the phrase ''[f]or so long as ArcaEx remains a Facility of PCX and PCXE and the FSA remains in full force and effect'' from each paragraph that contains such language; [17] and (iii) incorporate amendments to the provisions of the Certificate of Incorporation of Archipelago that are currently limited to activities of ArcaEx to cover activities of PCX and PCXE, as noted above; [18] (b) declare the advisability of such amendments; and (c) direct such amendments be submitted for stockholder approval at the earlier of (1) the 2006 annual meeting of Archipelago stockholders and (2) the first meeting of Archipelago stockholders to occur after the closing of the Merger (other than any meeting or meetings of Archipelago stockholders convened for the purpose of considering and approving the merger of Archipelago and the NYSE).[19]

*C. Change of Control of PCX; Voting and Ownership Limitations*

The current Certificate of Incorporation of PCXH provides that (1) no person (''Person'') [20] either alone or together with its related persons (''Related Persons''),[21] may own shares constituting more than 40% of the outstanding shares of capital stock of PCXH,[22] and (2) no trading permit holder of PCX or equities trading permit holder of PCXE, either alone or together with its Related Persons, may own shares constituting more than 20% of the outstanding shares of capital stock of PCXH.[23] In addition, the Certificate of Incorporation of PCXH provides that no Person, either alone of together with its Related Persons, may vote, possess the right to vote or cause the voting of shares representing more than 20% of the issued and outstanding capital stock of PCXH, and also places limitations on the ability of any person, either alone or together with its Related Persons, to enter into an agreement with respect to the withholding of any vote or proxy.[24]

1. Exceptions to PCXH Ownership and Voting Restrictions

As a result of the Merger, Archipelago will own 100% of the capital stock of PCXH. Thus, absent an exception, Archipelago and its Related Persons, some of which are ETP Holders, would exceed these ownership and voting limitations in violation of the current Certificate of Incorporation of PCXH. The proposed rule change therefore would amend the Certificate of Incorporation of PCXH to create an exception to the voting and ownership limitations for Archipelago and certain Related Persons of Archipelago to permit Archipelago to own 100% of the capital stock of PCXH.[25]

In particular, the proposed rule change would add a new paragraph at the end of Article Nine of the Certificate of Incorporation of PCXH that would provide that, for so long as Archipelago directly owns all of the outstanding capital stock of PCXH, the provisions of Article Nine, including the ownership

[14] Archipelago Bylaws, Proposed Section 6.8(e)(ii).

[15] Archipelago Bylaws, Proposed Section 6.8(e)(iii).

[16] Archipelago Bylaws, Proposed Section 6.8(e)(iv). Archipelago undertakes to take reasonable steps necessary to cause Archipelago's directors and officers and those Archipelago employees whose principal place of business and residence is outside the United States prior to accepting a position as an officer, director or employee, as applicable, of Archipelago to consent in writing to the applicability to them of this provision. Archipelago also undertakes that it will take reasonable steps necessary to cause Archipelago's current directors and officers and those current Archipelago employees whose principal place of business and residence is outside the United States to consent in writing prior to the consummation of the Merger to the applicability to them of this provision. *See* Notice, *supra* note 3.

[17] Paragraphs (C)(3)(y), (D)(2), (D)(2)(a) and (H)(3) of Article FOURTH, the third paragraph of Article EIGHTH, the penultimate paragraph of Article TENTH, Article THIRTEENTH, Article FOURTEENTH, Article FIFTEENTH, Article SIXTEENTH, Article SEVENTEENTH and Article NINETEENTH of the Certificate of Incorporation of Archipelago include this language.

[18] Articles THIRTEENTH, FOURTEENTH, SEVENTEENTH AND EIGHTEENTH of the Certificate of Incorporation of Archipelago would need to be so amended. *See supra* notes 13 to 16 and accompanying text.

[19] *See* Notice, *supra* note 3.

[20] Certificate of Incorporation of PCXH, Article Nine, Section 1(b)(iv), defines ''person'' as an individual, partnership (general or limited), joint stock company, corporation, limited liability company, trust or unincorporated organization, or any governmental entity or agency or political subdivision thereof.

[21] Certificate of Incorporation of PCXH, Article Nine, Section 1(b)(iv), defines ''related person'' to be (1) with respect to any person, all ''affiliates'' and ''associates'' of such person (as such terms are defined in Rule 12b–2 under the Act); (2) with respect to any person constituting a trading permit holder of PCX or an equities trading permit holder of PCXE, any broker dealer with which such holder is associated; and (3) any two or more persons that have any agreement, arrangement or understanding (whether or not in writing) to act together for the purpose of acquiring, voting, holding or disposing of shares of the capital stock of PCXH.

[22] Certificate of Incorporation of PCXH, Article Nine, Section 1(b)(i). Such restriction may be waived by the board of directors of PCXH pursuant to an amendment to the Bylaws of PCXH adopted by the board after making certain findings and following certain procedures as described in more detail in the Notice, *supra* note 3, and in Securities Exchange Act Release No. 49718 (May 17, 2004), 69 FR 29611 (May 24, 2004) (the ''May 2004 Order''). Certificate of Incorporation of PCXH, Article Nine, Sections 1(b)(i)(B) and 1(b)(i)(C).

[23] Certificate of Incorporation of PCXH, Article Nine, Section 1(b)(ii). There is no provision allowing the board to waive this restriction.

[24] Certificate of Incorporation of PCXH, Article Nine, Section 1(c). These restrictions were approved in connection with the 2004 demutualization of PCXH. *See* May 2004 Order, *supra* note 22, for a more detailed discussion of the current restrictions in the Certificate of Incorporation of PCXH.

[25] Certificate of Incorporation of PCXH, Proposed Article Nine, Section 4.

and voting limitations with respect to shares of PCXH capital stock, would not be applicable to the voting and ownership of shares of PCXH capital stock by (1) Archipelago, (2) any person that is a Related Person of Archipelago, either alone or together with its related persons, and (3) any other person to which Archipelago is a Related Person, either alone or together with its Related Persons. These exceptions to the ownership and voting limitations, however, would not apply to ''prohibited persons.'' [26]

''Prohibited persons'' would be defined to mean any person that is, or that has a related person that is (1) an OTP Holder or an OTP Firm (as such terms are defined in the rules of PCX, as such rules may be in effect from time to time) [27] or (2) an ETP Holder (as such term is defined in the rules of PCX, as such rules may be in effect from time to time),[28] except: (A) any broker or dealer approved by the Commission after June 20, 2005 to be a facility (as defined in Section 3(a)(2) of the Act) [29] of PCX; (B) any person that has been approved by the Commission prior to it becoming subject to the provisions of Article Nine of the Certificate of Incorporation of PCXH with respect to the voting and ownership of shares of PCXH capital stock by such person; and (C) any person that is a related person of Archipelago solely by reason of beneficially owning, either alone or together with its Related Persons, less than 20% of the outstanding shares of Archipelago capital stock (any person covered by (A) through (C) is referred to as a ''permitted person'' in proposed Section 4 of Article Nine of the Certificate of Incorporation of PCXH).[30] The proposed Section 4 of Article Nine of the Certificate of Incorporation of PCXH would further provide that any other prohibited person not covered by the definition of a permitted person who would be subject to and exceed the voting and ownership limitations imposed by Article Nine as of the date of the closing of the Merger would be permitted to exceed the voting and ownership limitations imposed by Article Nine only to the extent and for the time period approved by the Commission.[31]

a. Outbound Router

Archipelago Securities is a registered broker-dealer, a member of the National Association of Securities Dealers, Inc. (''NASD''), and an ETP Holder. Archipelago Securities currently provides an optional routing service for ArcaEx to route orders to other securities exchanges, facilities of securities exchanges, automated trading systems, electronic communications networks or other brokers or dealers (collectively, ''Market Centers'') from ArcaEx in compliance with PCXE rules (such function of Archipelago Securities is referred to as the ''Outbound Router''). In its capacity as an Outbound Router, Archipelago Securities operates and is regulated as a facility of PCX.[32] As such, the Outbound Router function of Archipelago Securities is subject to PCX's and the Commission's continuing oversight. In particular, PCX is responsible for filing with the Commission rule changes and fees relating to the Outbound Router function, and for ensuring that the Outbound Router complies with the requirement not to unfairly discriminate.[33] Archipelago intends to continue to own and operate Archipelago Securities following the closing of the Merger. The proposed operation of Archipelago Securities as an Outbound Router after the closing of the Merger will not change from the way it is administered and operated today.[34]

After the closing of the Merger, Archipelago's continued ownership of Archipelago Securities would cause Archipelago Securities to exceed the ownership and voting limitations contained in Article Nine of the Certificate of Incorporation of PCXH (because Archipelago Securities is an ETP Holder and a Related Person of Archipelago), absent an exception. Pursuant to the proposed exception in proposed Article Nine, Section 4 of the Certificate of Incorporation of PCXH for a Related Person of Archipelago that is a broker or dealer approved by the Commission after June 20, 2005 to be a facility of PCX, PCX has proposed that the Commission approve Archipelago Securities, a wholly owned subsidiary of Archipelago, to be a facility (as defined in Section 3(a)(2) of the Act) of PCX, subject to the following:

- PCX will continue to regulate the Outbound Router function of Archipelago Securities as a facility of the Exchange, subject to Section 6 of the Act.
- The NASD, a self-regulatory organization (''SRO'') unaffiliated with Archipelago or any of its affiliates, will continue to carry out oversight and enforcement responsibilities as the Designated Examining Authority (''DEA'') designated by the Commission pursuant to Rule 17d–1 of the Act with the responsibility for examining Archipelago Securities for compliance with the applicable financial responsibility rules.
- The agreement between the NASD and PCX currently in place pursuant to Rule 17d–2 under the Act [35] (the ''NASD PCX Agreement'') will remain in full force and effect and PCX will continue to abide by the terms of such agreement. The NASD PCX Agreement allocates to

[26] *Id.*

[27] PCX Rule 1.1(q) defines an ''OTP Holder'' to mean any natural person, in good standing, who has been issued an Options Trading Permit (''OTP'') by the Exchange for effecting approved securities transactions on the Exchange's trading facilities, or has been named as a Nominee. PCX Rule 1.1(n) defines a ''Nominee'' to mean an individual who is authorized by an ''OTP Firm'' (a sole proprietorship, partnership, corporation, limited liability company or other organization in good standing who holds an OTP or upon whom an individual OTP Holder has conferred trading privileges on the Exchange's trading facilities) to conduct business on the Exchange's trading facilities and to represent such OTP Firm in all matters relating to the Exchange.

[28] PCXE Rule 1.1(n) defines an ''ETP Holder'' to mean any sole proprietorship, partnership, corporation, limited liability company or other organization in good standing that has been issued an Equity Trading Permit, a permit issued by the PCXE for effecting approved securities transactions on the trading facilities of PCXE.

[29] Section 3(a)(2) defines the term ''facility,'' when used with respect to an exchange, to include its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service. 15 U.S.C. 78c(a)(2)

[30] Certificate of Incorporation of PCXH, Proposed Article Nine, Section 4.

[31] *Id.*

[32] Archipelago Securities was approved by the Commission to operate as a facility of PCXE on October 25, 2001 in connection with the Commission's approval of the rules of PCX establishing ArcaEx as a facility of PCXE. *See* Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (the ''Original Outbound Router Release''). The name of the order routing broker-dealer was originally Wave Securities, L.L.C. as approved by the Commission in the Original Outbound Router Release.

[33] *See, e.g.*, Section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5).

[34] As an Outbound Router, Archipelago Securities will continue to receive instructions from ArcaEx, route orders to other Market Centers in accordance with those instructions and be responsible for reporting resulting executions back to ArcaEx. In addition, all orders routed through Archipelago Securities would remain subject to the terms and conditions of PCXE rules. *See* Notice, *supra* note 3, and Original Outbound Router Release, *supra* note 32, at 55233–55235 (describing the operation of the order routing broker-dealer approved by the Commission).

[35] Rule 17d–2 provides that any two or more SROs may file with the Commission a plan for allocating among such SROs the responsibility to receive regulatory reports from persons who are members or participants of more than one of such SROs to examine such persons for compliance, or to enforce compliance by such persons, with specified provisions of the Act, the rules and regulations thereunder, and the rules of such SROs, or to carry out other specified regulatory functions with respect to such persons. 17 CFR 240.17d–2.

the NASD the responsibility to receive regulatory reports from Archipelago Securities, to examine Archipelago Securities for compliance and to enforce compliance by Archipelago Securities with the Act, the rules and regulations thereunder and the rules of the NASD, and to carry out other specified regulatory functions with respect to Archipelago Securities.

• PCX will amend the NASD PCX Agreement within 90 days of the Commission's approval of this proposed rule change [36] to expand the scope of the NASD's regulatory functions so as to encompass all of the regulatory oversight and enforcement responsibilities with respect to Archipelago Securities pursuant to applicable laws, except for real-time market surveillance.[37]

• An ETP Holder's use of Archipelago Securities to route orders to another Market Center from ArcaEx will continue to be optional. Any ETP Holder that does not want to use Archipelago Securities may use other routers to route orders to other Market Centers.[38]

• Archipelago Securities will not engage in any business other than its Outbound Router function (including, in that function, the self-clearing functions that it currently performs for trades with respect to orders routed to other Market Centers) and other activities approved by the Commission.

b. Inbound Router

As noted above in this Section II.C.1., the proposed rule change includes an exception to the ownership and voting restrictions in the Certificate of Incorporation of PCXH to allow any Related Person of Archipelago that is a prohibited person not covered by the definition of a permitted person to exceed these voting and ownership limitations only to the extent and for the time period approved by the Commission.[39] Archipelago wholly owns and operates two other ETP Holders, Wave and Arca Trading.[40] Wave acts as an introducing broker for institutional customers to provide access to ArcaEx and other market centers.[41] Arca Trading acts as an introducing broker for non-ETP Holder broker-dealer customers for securities traded on ArcaEx (individually and collectively, the ''Inbound Router functions'').[42] In addition, Archipelago Securities provides clearing functions for trades executed by the Inbound Router function of Arca Trading.

As a wholly owned subsidiary of Archipelago, each of Wave and Arca Trading is a Related Person of Archipelago, and thus Archipelago's ownership of PCXH, absent an exception, would cause Wave and Arca Trading, as ETP Holders, to exceed the voting and ownership limitations imposed by Article Nine of the Certificate of Incorporation of PCXH. PCX requests the Commission's approval of a temporary exception for (1) Arca Trading and Archipelago Securities, with respect to the Inbound Router function of Arca Trading and the related clearing function of Archipelago Securities, and (2) for Wave to permit them to exceed the voting and ownership limitations imposed by Article Nine of the Certificate of Incorporation of PCXH (as proposed to be amended as described in this filing) to the following extent and for the following time periods:

• Archipelago may, until December 31, 2005, continue to own Wave provided Archipelago continues to maintain and comply with its current information barriers between Wave on the one hand and PCX, PCXE, and other subsidiaries of Archipelago that are facilities of PCX or PCXE on the other hand.[43]

• Archipelago may, until the earlier of March 31, 2006 and the closing date of the proposed merger of Archipelago and the NYSE, continue to own and operate the Inbound Router function of Arca Trading and the related clearing function of Archipelago Securities following the closing of its acquisition of PCXH provided that: (1) The revenues derived by Archipelago from the Inbound Router function of Arca Trading do not exceed 7% of the consolidated revenues of Archipelago (determined on a quarterly basis); (2) the Inbound Router function of Arca Trading does not accept any new clients following the closing of the Merger; and (3) Archipelago continues to maintain and comply with its current information barriers between the Inbound Router function of Arca Trading on the one hand and PCX, PCXE, and other subsidiaries of Archipelago that are facilities of PCX or PCXE on the other hand.[44]

c. Other ETP Holders That Are ''Related Persons'' of Archipelago

PCX requests the Commission's approval of a temporary exception for Terra Nova so that Terra Nova may be permitted to exceed the voting and ownership limitations imposed by Article Nine of the Certificate of Incorporation of PCXH (as proposed to be amended as described in this filing) to the following extent and for the following time periods:

• Gerald D. Putnam, Chairman and Chief Executive Officer (''CEO'') of Archipelago, may, until December 31, 2005, continue to beneficially own in excess of 5% of Terra Nova and continue to serve as a director of TAL following the closing of the Merger notwithstanding the terms of the Certificate of Incorporation of PCXH, as proposed to be amended as described in this filing.[45]

Also, to abide by the terms of the Certificate of Incorporation of PCXH, as proposed to be amended as described in this filing, Kevin J.P. O'Hara, Chief Administrative Officer and General Counsel of Archipelago, and Paul Adcock, Managing Director, Trading, of

[36] *See* Amendment No. 2.

[37] In Amendment No. 2, PCX clarified that ''real-time market surveillance'' means marketplace regulation and marketplace surveillance, including surveillance and enforcement related to PCXE trading rules, PCX and PCXE rules relating to trading on ArcaEx, and Commission rules relating to trading.

[38] An ETP Holder may chose to route an order to ArcaEx that, if not executable on ArcaEx, will be cancelled and returned to the ETP Holder, at which time the ETP Holder could chose to route the order to another market.

Those ETP Holders who choose to use the Outbound Router function provided by Archipelago Securities must sign an Archipelago Securities Routing Agreement. Importantly, among other things, the Archipelago Securities Routing Agreement provides that all orders routed through Archipelago Securities are subject to the terms and conditions of PCXE rules. See Archipelago Securities Routing Agreement, *http://www.tradearca.com/exchange/pdfs/ETPApplication.pdf* (as of September 20, 2005).

[39] Certificate of Incorporation of PCXH, Proposed Article Nine, Section 4.

[40] Each of Wave and Arca Trading is a wholly owned subsidiary of Archipelago, an ETP Holder, and a member of the NASD. *See* Amendment No. 2.

[41] *See* Amendment No. 2.

[42] *Id.*

[43] PCX clarified in Amendment No. 2 that the request for a temporary exception for Wave is subject to this condition.

[44] *See* Amendment No. 2. The Commission also notes that each of Wave, Arca Trading and Arca Securities are covered by the NASD PCX Agreement, *see* Amendment No.2 and *supra* Section II.C.1.a, and that the NASD is the DEA for each.

[45] Terra Nova is an ETP Holder and a wholly owned subsidiary of TAL. Archipelago's ownership of PCXH would cause Terra Nova, as an ETP Holder, to exceed the ownership and voting limitations imposed by Article Nine of the Certificate of Incorporation of PCXH (as proposed to be amended) as of the date of the closing of the Merger, by virtue of Mr. Putnam's beneficial ownership in excess of 5% of Terra Nova and his service as a director of TAL. *See* Amendment No. 2. PCX clarified that Mr. Putnam's ownership of Terra Nova is beneficial, not direct. Terra Nova is a wholly owned subsidiary of TAL and Mr. Putnam owns 40% of TAL. Telephone conversation between Kathryn Beck, General Counsel, PCX and Jennifer Dodd, Special Counsel, Division of Market Regulation (''Division''), Commission, on September 20, 2005.

Archipelago, shall resign from the board of directors of White Cap prior to the Effective Time.[46]

In addition to its Inbound Router services, Arca Trading operates an alternative trading system (''ATS''), as defined in Rule 300 of Regulation ATS under the Act,[47] for trading in over-the-counter bulletin board securities that are not traded on any securities exchange (the ''ATS OTC function'').[48] Archipelago Securities also engages in the business of providing broker-dealer clients with direct connectivity to the NYSE, through the NYSE's Designated Order Turnaround system (the ''DOT function'').[49] PCX requests the Commission's approval of an exception for Arca Trading and Archipelago Securities from the voting and ownership limitations of Article Nine of the Certificate of Incorporation of PCXH (as proposed to be amended as described in this filing) to the following extent and for the following time periods:

- Archipelago may continue to own the ATS OTC function of Arca Trading for a period of 60 days following the closing of the Merger; [50] and
- Archipelago may own the DOT function of Archipelago Securities until the earlier of (1) a period of 60 days following the closing of the Merger, and (2) the closing date of the proposed merger of Archipelago and the NYSE.[51]

2. Ownership and Voting Restrictions on Archipelago Stockholders

The Certificate of Incorporation of Archipelago contains similar ownership and voting restrictions with respect to Archipelago stock as those imposed on PCXH stockholders under the Certificate of Incorporation of PCXH. These provisions are intended to ensure that the ownership of Archipelago by the public will not unduly interfere with or restrict the ability of the Commission or PCX to effectively carry out their regulatory oversight responsibilities under the Act, with respect to ArcaEx, and generally to enable ArcaEx to operate in a manner that complies with the Federal securities laws, including furthering the objectives of Section 6(b)(5) of the Act.[52]

Specifically, (1) no person,[53] either alone or together with its related persons,[54] shall be permitted at any time to own beneficially shares of Archipelago stock representing in the aggregate more than 40% of the then outstanding votes entitled to be cast on any matter,[55] and (2) for long as ArcaEx is a facility of PCX and PCXE and the FSA is in effect,[56] no ETP Holder, either alone or with its related persons, shall be permitted at any time to own beneficially shares of Archipelago stock representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter.[57] In addition, no person, either alone or with its related persons, may (1) vote or cause the voting of shares of stock of Archipelago to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (''Archipelago Certificate Voting Limitation''), or (2) enter into any agreement, plan or arrangement not to vote shares, the effect of which agreement, plan or arrangement would be to enable any person, either alone or with its related persons, to vote or cause the voting of shares that would represent in the aggregate more that 20% of the then outstanding votes entitled to be cast on any matter (''Archipelago Certificate Non-Voting Agreement Prohibition'').[58]

Because Archipelago would own PCXH, and thus PCX, after the Merger, the proposed PCX rules would extend the ownership restriction in Archipelago's Certificate of Incorporation to PCX members other than ETP Holders. The proposed PCX rules would provide that for as long as Archipelago controls, directly or indirectly, PCX, no OTP Holder or OTP Firm, either alone or with its related persons,[59] shall own beneficially shares of Archipelago stock representing in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the ''Ownership Limitation'').[60]

In addition to this Ownership Limitation, the proposed PCX rules provide that for as long as Archipelago shall control, directly or indirectly, PCX, no OTP Holder or OTP Firm, either alone or together with its related persons, shall (1) have the right to vote, vote or cause the voting of shares of stock of Archipelago to the extent such shares represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the ''Voting Limitation'') or (2) enter into any agreement, plan or arrangement not to vote shares, the effect of which agreement, plan or arrangement would be to enable any person, either alone or with its related persons, to vote or cause the voting of shares that would represent in the aggregate more than 20% of the then outstanding votes entitled to be cast on any matter (the ''Nonvoting Agreement Prohibition'').[61]

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[46] White Cap is an ETP Holder and a Related Person of Archipelago by virtue of Messrs. O'Hara and Adcock's services as directors of White Cap. *See* Amendment No. 2.

[47] 17 CFR 242.300.

[48] *See* Amendment No. 2. Archipelago Securities provides clearing functions for trades executed on this ATS, and PCX requested an exception for this clearing function in the Notice.

[49] This service is separate from Archipelago Securities' Outbound Router function and is not included within the request for an exception for the Outbound Router function described in Section II.C.1.a. above. *See* Amendment No. 2.

[50] *See* Amendment No. 2.

[51] *Id.*

[52] These restrictions were approved by the Commission in connection with Archipelago's initial public offering in 2004. *See* August 2004 Order, *supra* note 8.

[53] Person means a natural person, company, government, or political subdivision, agency, or instrumentality of a government. Certificate of Incorporation of Archipelago, Article FOURTH, Section H(2).

[54] Related Persons is defined in Article FOURTH, Section H(3) of the Certificate of Incorporation of Archipelago.

[55] Such restriction may be waived by the board of directors of Archipelago after making certain findings and following certain procedures as described in more detail in Article FOURTH, Section D(1) of the Certificate of Incorporation of Archipelago.

[56] PCX proposes to amend the Archipelago Bylaws to provide that Archipelago will not take any action, and will not permit any of its subsidiaries to take any action that will cause (i) ArcaEx to cease to be a facility of PCX and PCXE, or (ii) the FSA to cease to be in full force and effect, unless each provision in the Certificate of Incorporation of Archipelago that is subject to this limitation, including this provision, is amended to provide that such provision shall remain in full force and effect whether or not ArcaEx remains a facility of PCX and PCXE or the FSA is in full force and effect. Archipelago also undertakes that its board of directors will propose, and declare the advisability of, and submit to shareholders certain amendments to its certificate to extend the ownership and voting limitations to all PCX members and to delete this limiting language. See *supra* notes 17 to 19 and accompanying text.

[57] Certificate of Incorporation of Archipelago, Section D(2) of Article FOURTH. The Certificate of Incorporation of Archipelago does not have any provisions that would permit the Board of Archipelago to waive the 20% limitation relating to any ETP Holders. In addition, if an ETP Holder, either alone or together with its related persons, owns beneficially shares of stock of Archipelago in excess of this 20% limitation, Archipelago would be required to call from such ETP Holder and its related persons that number of shares of stock entitled to vote that exceed the 20% limitation at a price equal to par value of the shares of stock. Certificate of Incorporation of Archipelago, Section D(2).

[58] Certificate of Incorporation of Archipelago, Sections C of Article FOURTH.

[59] ''Related persons'' would be defined in proposed PCX Rule 1.1(gg).

[60] Proposed PCX Rule 3.4(a).

[61] Proposed PCX Rule 3.4(b). The Voting Limitation and Nonvoting Agreement Prohibition would not apply to (1) any solicitation of any revocable proxy from any stockholder of Archipelago by or on behalf of Archipelago or by an officer or director of Archipelago acting on behalf of Archipelago or (2) any solicitation of any revocable proxy from any stockholder of Archipelago by any other stockholder that is conducted pursuant to, and in accordance with, Regulation 14A promulgated pursuant to the Act. *Id.*

The proposed rules also would require OTP Holders, OTP Firms, and their ''associated persons'' (as such term is defined in Section 3(a)(18) of the Act,[62] and referred to as ''OTP Associates''), to enter into an agreement with PCX and Archipelago [63] pursuant to which such OTP Holder, OTP Firm or OTP Associate would agree to comply with the ownership and voting limitations imposed by the proposed PCX rules,[64] to authorize Archipelago to vote their shares of Archipelago stock in favor of amendments to the Certificate of Incorporation of Archipelago that incorporate such ownership and voting limitations,[65] and to be subject to disciplinary action pursuant to the proposed PCX rules if they violate any of the ownership and voting limitations or fail to enter into such ownership and voting agreement (such agreement, the ''Ownership and Voting Agreement'').[66] Under the proposed rules, failure to comply with the ownership and voting limitations or failure to enter into the Ownership and Voting Agreement in a timely manner would subject the responsible OTP Holder or OTP Firm to the suspension of all trading rights and privileges, unless such violation is cured.[67]

In addition, the proposed rules would require that the Ownership and Voting Agreement contain provisions designed to provide a disincentive for OTP Holders and OTP Firms to exceed the ownership and voting limitations imposed by the PCX rules. Specifically, proposed PCX Rule 3.4(d) would provide that in the event that any OTP Holder or OTP Firm, either alone or with its related persons (including any related persons who are OTP Associates of such OTP Holder or OTP Firm), at any time owns beneficially shares of Archipelago stock in excess of the Ownership Limitation, Archipelago would be required to promptly call from such OTP Holder or OTP Firm, or an OTP Associate of such OTP Holder or OTP Firm, at a price per share equal to the par value thereof, shares of Archipelago stock owned by such OTP Holder, OTP Firm or OTP Associate that are necessary to decrease the beneficial ownership of such OTP Holder or OTP Firm, either alone or with its related persons, to 20% of the then outstanding votes entitled to be cast on any matter after giving effect to the redemption of the shares of Archipelago stock.[68]

The proposed PCX rules and the Ownership and Voting Agreement also would provide that, if any OTP Holder or OTP Firm, either alone or with its related persons (including any related persons who are OTP Associates of such OTP Holder or OTP Firm), acquires the right to vote more than 20% of the then outstanding votes entitled to be cast by stockholders of Archipelago on any matter, Archipelago shall have the right to vote and shall vote such shares of Archipelago stock.[69] In addition, the proposed PCX rules and the Ownership and Voting Agreement would provide that in the event any OTP Holder or OTP Firm, either alone or with its related persons (including any related person that is an OTP Associate of such OTP Holder or OTP Firm), has cast votes, in person or by proxy or through any voting agreement or other arrangement, in excess of the Voting Limitation, Archipelago may bring suit in a court of competent jurisdiction against such OTP Holder, OTP Firm or OTP Associates seeking enforcement of the Voting Limitation.[70]

Furthermore, the proposed PCX rules provide that in the event of any violation by any OTP Holder or OTP Firm of the Ownership Limitation, Voting Limitation or Nonvoting Agreement Prohibition (including, without limitation, any failure of an OTP Holder, OTP Firm or OTP Associate to enter into the Ownership and Voting Agreement within the applicable time periods), the Exchange shall suspend all trading rights and privileges of such OTP Holder or OTP Firm in accordance with proposed PCX Rule 13.2(a)(2)(E), subject to the procedures provided therein.[71]

In addition, PCX proposes an amendment to the Archipelago Bylaws that would prohibit the board of directors of Archipelago from waiving the 40% ownership limitation, the Archipelago Certificate Voting Limitation or the Archipelago Certificate Non-Voting Agreement Prohibition for any OTP Holder, OTP Firm, or any of their related persons.[72] The proposed amendments to the Archipelago Bylaws also would clarify that, should Archipelago call shares from certain of its stockholders in the event of breaches of certain ownership limitations pursuant to Archipelago's Certificate of Incorporation, the board of directors of Archipelago would cause Archipelago to call promptly shares of stock of Archipelago and also to give notice of such call promptly.[73]

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2, including whether Amendment No. 2, is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments:*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File

[62] 15 U.S.C. 78c(a)(18).

[63] Proposed PCX Rule 3.4(c) would require (1) a person who is an OTP Holder, OTP Firm or OTP Associate which is not an ETP Holder and which (x) owns beneficially any shares of Archipelago stock or (y) has entered into any agreement, plan or other arrangement relating to the voting or ownership of any shares of Archipelago stock, at the time of the closing of the Merger, to enter into the Ownership and Voting Agreement (as defined below) no later than 30 calendar days following the date of closing of the Merger; and (2) a person who is any OTP Holder, OTP Firm or OTP Associate which is not required to enter into an Ownership and Voting Agreement pursuant to the above clause to enter into the Ownership and Voting Agreement no later than the fifth calendar day following the date on which: (x) such OTP Holder, OTP Firm or OTP Associate ceases being an ETP Holder and (A) owns or acquires beneficial ownership of any shares of Archipelago stock or (B) is a party to or enters into any agreement, plan or other arrangement relating to the voting or ownership of any shares of Archipelago stock; or (y) such OTP Holder, OTP Firm or OTP Associate which is not an ETP Holder (A) acquires beneficial ownership of any shares of Archipelago stock or (B) enters into any agreement, plan or other arrangement relating to the voting or ownership of any shares of Archipelago stock.

[64] Proposed PCX Rules 3.4(c)(1) and (c)(2).

[65] Proposed PCX Rule 3.4(c)(3).

[66] Proposed PCX Rule 3.4(d)(3).

[67] Proposed PCX Rule 13.2(a)(2)(E). Proposed PCX Rule 13.2(a)(2)(E) would provide that in the event of any such failure to comply with proposed PCX Rule 3.4, PCX shall: (1) provide notice to the applicable OTP Holder or OTP Firm within five business days of learning of the failure to comply; (2) allow the applicable OTP Holder, OTP Firm or OTP Associate of such OTP Holder or OTP Firm fifteen calendar days to cure any such failure to comply; (3) in the event that the applicable OTP Holder, OTP Firm or OTP Associate of such OTP Holder or OTP Firm does not cure such failure to comply within such fifteen calendar day cure period, schedule a hearing to occur within thirty calendar days following the expiration of such fifteen calendar day cure period; and (4) render its decision as to the suspension of all trading rights and privileges of the applicable OTP Holder or OTP Firm no later than ten calendar days following the date of such hearing.

[68] Proposed PCX Rule 3.4(d)(1). For additional details on the procedures for making such calls and on the formula for determining the number of shares to be called, *see* Notice, *supra* note 3.

[69] Proposed PCX Rule 3.4(d)(2).

[70] Proposed PCX Rule 3.4(d)(4). The Commission notes that OTP Holders and OTP Firms are currently subject to the existing voting limitations contained in the Certificate of Incorporation of Archipelago that apply to any person. Certificate of Incorporation of Archipelago, Article FOURTH, Section C.

[71] Proposed PCX Rule 3.4(d)(3).

[72] Archipelago Bylaws, Proposed Section 6.8(d). *See* Article FOURTH, Section H(3) of the Certificate of Incorporation of Archipelago for the definition of ''related person.'' For additional details regarding this definition, *see* August 2004 Order, *supra* note 8.

[73] Archipelago Bylaws, Proposed Section 6.8(f).

Number SR–PCX–2005–90 on the subject line.

*Paper Comments:*

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–PCX–2005–90. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of PCX. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to Amendment No. 2 of File Number SR–PCX–2005–90 and should be submitted on or before October 20, 2005.

## IV. Discussion of Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[74] In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,[75] which requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules or regulations thereunder, and the rules of the exchange. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,[76] which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade; to facilitate transactions in securities; to remove impediments to and perfect the mechanisms of a free and open market and a national market system; and, in general, to protect investors and the public interest.[77]

The Commission discusses below significant aspects of the proposed rule change.

### *A. Self-Regulatory Function of the Exchange; Relationship Between PCX and Archipelago; Jurisdiction Over Archipelago*

As represented by PCX, the Merger will not affect the internal corporate structure of PCXH or the regulatory relationship among PCX, PCXE, and ArcaEx, except as described in Section II.A above or otherwise approved by the Commission. PCX will continue operating the options business of the Exchange, and ArcaEx will remain the exclusive equities trading facility of PCX and PCXE (and the FSA will remain in full force and effect in its current form). PCX will continue to operate as a registered national securities exchange under Section 6 of the Act, and will retain the self-regulatory organization function. Except as otherwise discussed herein, PCXE's operations, governance structure, or rules will not be affected by the Merger. All persons using PCX or ArcaEx will continue to be subject to the Exchange's rules and PCX will maintain its current regulatory authority over its members. Although Archipelago and PCXH do not themselves carry out regulatory functions, their activities with respect to the operation of ArcaEx and options trading on PCX should be consistent, and not interfere, with PCX's self-regulatory obligations.

Certain provisions in the Certificate of Incorporation and Bylaws of PCXH (as the owner of the Exchange) and Archipelago (as the owner and operator of the equities trading facility of the Exchange) are designed to maintain the independence of PCX's self-regulatory function and facilitate the ability of PCX, PCXE, and the Commission to fulfill their regulatory and oversight obligations under the Act.[78] For example, PCXH and Archipelago consented to the Commission's jurisdiction with respect to activities relating to PCX, or ArcaEx, respectively, agreed to provide the Commission and PCX access to their books and records to the extent they relate to PCX or ArcaEx, respectively, and agreed to cooperate with the Commission and PCX pursuant to their regulatory authority.[79] PCXH and Archipelago also agreed to keep confidential non-public information relating to PCX and not to use such information for any commercial purposes.[80] In addition, the boards of directors of PCXH and Archipelago are required to explicitly consider in the performance of their duties PCX's regulatory obligations under the Act.[81]

Because Archipelago will become the sole stockholder and the parent of PCXH as a result of the Merger, and thus the owner of the Exchange in addition to the equities trading facility of the Exchange, the Commission continues to believe that such provisions are appropriate. Certain of these provisions in the Certificate of Incorporation of Archipelago and the Archipelago Bylaws, however, currently apply only with respect to activities related to ArcaEx, or only so long as ArcaEx remains the exclusive equities trading facility of PCX and the FSA remains in full force and effect.[82] To assure the continued force and effect of these provisions after Archipelago acquires the Exchange, even if there is a change in the relationship of PCX and PCXE to ArcaEx or the effectiveness of the FSA after completion of the Merger, PCX proposes to amend the Archipelago Bylaws to expand the application of these provisions to activities related to PCX and PCXE.[83] In addition, PCX proposes to amend the Archipelago Bylaws to provide that Archipelago will not take any action, and will not permit any of its subsidiaries (which will include PCXH, PCX, and PCXE, as well

[74] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[75] 15 U.S.C. 78f(b)(1).

[76] 15 U.S.C. 78f(b)(5).

[77] The Commission notes that it is in the process of reviewing issues relating to new ownership structures of SROs, and has proposed rules relating to the ownership of SROs, including imposing restrictions on member ownership of an SRO or a facility of an SRO. *See* Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004).

[78] *See* Sections V.C and V.D of the May 2004 Order, *supra* note 22, and Sections IV.A and IV.D of the August 2004 Order, *supra* note 8.

[79] Bylaws of PCXH, Article 7, Sections 7.03, 7.04 and 7.05 and Certificate of Incorporation of Archipelago, Articles THIRTEENTH, FOURTEENTH and SIXTEENTH.

[80] Bylaws of PCXH, Article 3, Section 3.15 and Certificate of Incorporation of Archipelago, Article FOURTEENTH.

[81] Bylaws of PCXH, Article 3, Section 3.15 and Certificate of Incorporation of Archipelago, Article TENTH.

[82] *See supra* notes 8 and 11 and accompanying text.

[83] *See supra* notes 12 to 16 and accompanying text.

as ArcaEx) to take any action that will cause (i) ArcaEx to cease to be a facility of PCX and PCXE, or (ii) the FSA to cease to be in full force and effect, unless each provision in the Certificate of Incorporation of Archipelago that is subject to the limitations described above is amended to provide that such provision shall remain in full force and effect whether or not ArcaEx remains a facility of PCX and PCXE or the FSA is in full force and effect.[84]

In addition, as noted above in Section II.B, Archipelago represents that, prior to the earlier of (1) the 2006 annual general meeting of Archipelago stockholders and (2) the first meeting of Archipelago stockholders to occur after the closing of the Merger (other than any meeting or meetings of Archipelago stockholders convened for the purpose of considering and approving the merger of Archipelago and the NYSE), that its board of directors will: (a) Propose amendments to the Certificate of Incorporation of Archipelago to (i) delete the phrase ''[f]or so long as ArcaEx remains a Facility of PCX and PCXE and the FSA remains in full force and effect'' from each paragraph that contains such language, and (ii) incorporate amendments to the provisions of the Certificate of Archipelago that are currently limited to activities of ArcaEx to cover activities of PCX and PCXE, as noted above; [85] (b) declare the advisability of such amendments; and (c) direct such amendments be submitted for stockholder approval at the earlier of (1) the 2006 annual meeting of Archipelago stockholders and (2) the first meeting of Archipelago stockholders to occur after the closing of the Merger (other than any meeting or meetings of Archipelago stockholders convened for the purpose of considering and approving the merger of Archipelago and the NYSE).[86]

These amendments to the Archipelago Bylaws, coupled with the undertakings of Archipelago, are designed to maintain the independence of PCX's self-regulatory function and generally to enable the Exchange to operate in a manner that complies with the federal securities laws, including furthering the objectives of Sections 6(b) and 19(g) of the Act,[87] as well as to facilitate the ability of the Commission to exercise appropriate oversight over the Exchange and its controlling persons. The Commission believes that these provisions are appropriate and consistent with the Act.

The Commission believes that, even in the absence of these proposed amendments and undertakings, Section 20(a) of the Act [88] provides that any person with a controlling interest in Archipelago would be jointly and severally liable with and to the same extent that Archipelago is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. In addition, Section 20(e) of the Act [89] creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder, and Section 21C of the Act [90] authorizes the Commission to enter a cease-and-desist order against any person who has been ''a cause of'' a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.

*B. Change of Control of PCX; Ownership and Voting Limitations*

1. Limited Exception To Allow Archipelago To Acquire PCXH

As noted above, the Certificate of Incorporation of PCXH currently contains provisions that impose limitations on direct and indirect changes in control of PCXH that are designed to prevent any shareholder, or any shareholders acting together, from exercising undue control over the operations of the Exchange and to ensure that PCX, PCXE, and the Commission are able to carry out their regulatory obligations under the Act. These provisions include a separate, heightened ownership restriction on any member of PCX.[91] As a result of the Merger, Archipelago will own 100% of the capital stock of PCXH, which would violate the ownership and voting limitations in the current Certificate of Incorporation of PCXH, absent an exception.[92] Thus, to permit Archipelago to acquire PCXH, PCX has requested that the Commission approve a limited exception from the ownership and voting restrictions in PCXH's Certificate of Incorporation for Archipelago and its Related Persons, other than Related Persons that are ''prohibited persons'' (*i.e.*, PCX members) and that are not ''permitted persons'' or affirmatively approved by the Commission.[93]

Stockholders of Archipelago currently are subject to ownership and voting restrictions substantially similar to those imposed on PCXH stockholders.[94] The heightened restrictions on members of PCX, however, are not analogous, because the ownership restrictions contained in the Certificate of Incorporation of Archipelago that impose heightened restrictions on PCX members apply only to ETP Holders.[95] These heightened restrictions on ETP Holders were imposed at a time when Archipelago owned and operated ArcaEx, the equities trading facility of PCX, but not the options trading business of the Exchange. After the Merger, however, Archipelago will also own 100% of the Exchange. Therefore, to preserve the general applicability and scope of the ownership and voting restrictions as they currently exist in the Certificate of Incorporation of PCXH once Archipelago acquires PCXH, the Exchange requests that the Commission approve changes to PCX rules and the Archipelago Bylaws that are designed to impose substantially similar ownership and voting requirements on Archipelago's stockholders that are PCX members to those that currently are imposed on PCXH stockholders that are PCX members.

Specifically, proposed PCX Rule 3.4 would impose on any OTP Holder or OTP Firm that is not an ETP Holder voting and ownership limitations that are analogous to those currently imposed on ETP Holders by the Certificate of Incorporation of Archipelago. The proposed PCX rules also would require OTP Holders, OTP Firms, and their OTP Associates to enter into Ownership and Voting Agreements with PCX and Archipelago pursuant to which such OTP Holder, OTP Firm or OTP Associate would agree to comply with the ownership and voting limitations imposed by the proposed PCX rules, to authorize Archipelago to vote their shares of Archipelago stock in favor of amendments to the Certificate of Incorporation of Archipelago that

[84] Archipelago Bylaws, Proposed Section 6.8(c). *See supra* notes 9 to 10 and accompanying text.

[85] Articles THIRTEENTH, FOURTEENTH, SEVENTEENTH AND EIGHTEENTH of the Certificate of Incorporation of Archipelago would need to be so amended.

[86] *See* Notice, *supra* note 3.

[87] 15 U.S.C. 78f(b) and 78s(g).

[88] 15 U.S.C. 78t(a).

[89] 15 U.S.C. 78t(e).

[90] 15 U.S.C. 78u–3.

[91] *See supra* notes 22 to 24 and accompanying text, and Section V.B of the May 2004 Order, *supra* note 22.

[92] Certificate of Incorporation of PCXH, Proposed Article Nine, Section 4.

[93] Certificate of Incorporation of PCXH, Proposed Article Nine, Section 4. *See supra* notes 27 to 31 and accompanying text for a detailed definition of ''prohibited person'' and ''permitted person.''

[94] *See supra* notes 53 to 58 and accompanying text and Certificate of Incorporation of Archipelago, Article FOURTH, Sections C and D.

[95] *See supra* note 57 and accompanying text and Certificate of Incorporation of Archipelago, Article FOURTH, Section D(2).

incorporate such ownership and voting limitations, and to be subject to the disciplinary action in the proposed PCX rules if they violate any of the ownership and voting limitations or fail to enter into such Ownership and Voting Agreement.[96] Under the proposed rules, failure to comply with the ownership and voting limitations or failure to enter into the Ownership and Voting Agreement as required would subject the responsible OTP or OTP Firm to the suspension of all trading rights and privileges, unless such violation is cured within a limited time period.[97]

The Commission believes that the ownership and voting restrictions on OTP Holders and OTP Firms in the proposed PCX rules and the Ownership and Voting Agreement, along with the amendment to the Archipelago Bylaws that would prohibit the waiver of the 40% ownership limitations, Archipelago Certificate Voting Limitation and the Archipelago Certificate Non-Voting Agreement Prohibiting for OTP Holders, OTP Firms and their related persons, are reasonable and consistent with the Act. Members that trade on an exchange or through the facility of an exchange traditionally have ownership interests in such exchange or facility. As the Commission has noted in the past, however, a member's interest in an exchange could become so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that is a controlling shareholder of an exchange might be tempted to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and surveil the member's conduct or diligently enforce its rules and the federal securities laws with respect to conduct by the member that violates such provisions.

The proposed amendments to PCX rules and the Archipelago Bylaws that would extend ownership and voting limitations to non-ETP Holder members of PCX substantially similar to those that currently exist for ETP Holders, coupled with the existing ownership and voting limitations contained in the Certificate of Incorporation of Archipelago, are designed to preserve the current limitations on direct and indirect control of the Exchange, once Archipelago acquires PCXH. The Commission therefore believes it is appropriate and consistent with the Act to allow a limited exception from the PCXH ownership and voting limitations for Archipelago and certain of its Related Persons, to allow Archipelago to own 100% of PCXH. These proposed changes will help ensure that, upon consummation of the Merger, the public company nature of Archipelago will not unduly interfere with or restrict the regulatory oversight responsibilities of the Commission or PCX with respect to the options and equities business of the Exchange.

2. Exceptions for Members That Are Related Persons of Archipelago

Archipelago's 100% ownership of PCXH also would cause any member of PCX that is a Related Person of Archipelago (for instance, any member that is wholly owned by Archipelago) to exceed the ownership and voting limitations contained in the Certificate of Incorporation of PCXH. As noted above, the proposed exception from the ownership and voting restrictions contained in the Certificate of Incorporation of PCXH would apply to Archipelago and its Related Persons. The proposed exception would not, however, cover any Related Person that is a ''prohibited person''—*i.e.*, an ETP Holder, OTP Holder, or OTP Firm—other than those members that are considered ''permitted persons'' or specifically approved by the Commission. Permitted persons would include: (A) Any broker or dealer approved by the Commission after June 20, 2005 to be a facility of PCX; (B) any person which has been approved by the Commission prior to it becoming subject to the provisions of Article Nine of the Certificate of Incorporation of PCXH with respect to the voting and ownership of shares of PCXH capital stock by such person; and (C) any person which is a related person of Archipelago solely by reason of beneficially owning, either alone or together with its Related Persons, less than 20% of the outstanding shares of Archipelago capital stock.[98] The proposed Section 4 of Article Nine of the Certificate of Incorporation of PCXH would further provide that any other prohibited person not covered by the definition of a permitted person who would be subject to and exceed the voting and ownership limitations imposed by Article Nine as of the date of the closing of the Merger would be permitted to exceed the voting and ownership limitations imposed by Article Nine only to the extent and for the time period approved by the Commission.[99]

The Commission believes it is appropriate and consistent with the Act to exclude from the scope of the proposed exception to the PCXH ownership and voting limitations those Related Persons of Archipelago that are members of PCX, other than those that are specifically approved by the Commission or that are Related Persons solely because of their limited ownership of Archipelago stock, so as to help prevent a member or members of PCX from exercising undue influence over, or interfering with the operation and self-regulatory function, of the Exchange.

As detailed above, Archipelago currently owns or is affiliated with several member of PCX.[100] By virtue of their affiliation with Archipelago, these members would exceed the ownership and voting limitations in the Certificate of Incorporation of PCXH after Archipelago's acquisition of PCXH, absent an exception. These PCX members, however, would be excluded from the proposed exception to PCXH's ownership and voting limitations (and thus, Archipelago would be required to divest its interest in such PCX members) unless they are affirmatively approved by the Commission.

a. Outbound Router

PCX has specifically requested that the Commission approve an exception for Archipelago Securities' Outbound

[96] Proposed PCX Rule 3.4(c).

[97] *See supra* note 67 and proposed PCX Rule 13.2(a)(2)(E). PCX also proposes amendments to the Archipelago Bylaws that will prohibit the board of directors of Archipelago from waiving the 40% ownership limitation, the Archipelago Certificate Voting Limitation and the Archipelago Certificate Non-Voting Agreement Prohibition relating to any OTP Holder, OTP Firm, or any of their related persons. *See supra* note 72 and accompanying text. In addition, PCX proposes to amend the Archipelago Bylaws to provide that Archipelago will not take any action, and will not permit any of its subsidiaries to take any action that will cause (i) ArcaEx to cease to be a facility of PCX and PCXE, or (ii) the FSA to cease to be in full force and effect, unless each provision in the Certificate of Incorporation of Archipelago that is subject to this limitation, including the provision relating to ownership by ETP Holders, is amended to provide that such provision shall remain in full force and effect whether or not ArcaEx remains a facility of PCX and PCXE or the FSA is in full force and effect. Archipelago also undertakes that its board of directors would: (a) Propose amendments to the Certificate of Incorporation of Archipelago to (i) extend the application of voting and ownership limitations imposed on ETP Holders currently contained in the Certificate of Incorporation of Archipelago to OTP Holders and OTP Firms and (ii) delete the phrase ''[f]or so long as ArcaEx remains a Facility of PCX and PCXE and the FSA remains in full force and effect'' from each paragraph that contains such language; (b) declare the advisability of such amendments; and (c) direct such amendments be submitted for stockholder approval. *See supra* notes 10 and 17 to 19 and accompanying text.

[98] Certificate of Incorporation of PCXH, Proposed Article Nine, Section 4.

[99] *Id.*

[100] *See supra* Section II.C.1.

Router function as a facility of the Exchange, pursuant to several conditions and undertakings. First, Archipelago Securities is, and will continue to be operated and regulated as, a facility of PCX. As a facility of PCX, PCX would be responsible for regulating the Outbound Router function as an exchange facility subject to Section 6 of the Act, and the Outbound Router function would be subject to the Commission's continuing oversight. Archipelago's performance of its Outbound Router function would have to be in compliance with PCX's rules.

Second, the scope of the exception would be limited to the Outbound Router function, *i.e.*, routing orders entered into ArcaEx to other Market Centers in compliance with PCXE rules. In addition, another unaffiliated SRO (the NASD) would continue to have primary regulatory oversight responsibility for Archipelago Securities pursuant to Rules 17d–1 and 17d–2 under the Act. The Commission emphasizes that PCX has undertaken to amend the NASD PCX Agreement [101] within 90 days of the Commission's approval of this proposed rule change to expand the scope of the NASD's regulatory functions under the NASD PCX Agreement so as to encompass all of the regulatory oversight and enforcement responsibilities with respect to Archipelago Securities pursuant to applicable laws, except for real-time market surveillance.[102] Finally, the continued use of the Outbound Router function also will remain optional for other PCX members.[103]

Although the Commission is concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests when the exchange is affiliated with one of its members, the Commission believes that it is appropriate and consistent with the Act to permit Archipelago to continue to own and operate Archipelago Securities, in its capacity as a facility of PCX that routes orders from ArcaEx to other Market Centers, in light of the protections afforded by the conditions described above.

b. Inbound Router

PCX also has requested a temporary exception from the ownership and voting limitations for the Inbound Router functions of Wave until December 31, 2005, and for Arca Trading until the earlier of March 31, 2006 and the closing of Archipelago's pending merger with the NYSE.[104] These temporary exceptions would be subject to several conditions, as proposed. The operation of both Wave and Arca Trading's Inbound Router functions during the interim periods will continue to be subject to Archipelago's current information barriers between Wave and Arca Trading on the one hand and PCX, PCXE, and other subsidiaries of Archipelago that are facilities of PCX or PCXE on the other hand.[105] The Commission also notes that both Wave and Arca Trading are members of the NASD as well as PCX, that the NASD is the DEA for both Wave and Arca Trading, and that Wave and Arca Trading are, and will continue to be during the interim periods, covered by the scope of the NASD PCX Agreement.[106] In addition, during the interim period, the amount of revenue that Archipelago can earn from the operation of Arca Trading will not exceed 7% of its consolidated revenues, measured on a quarterly basis, and the Inbound Router function of Arca Trading will not accept any new clients following the closing of the Merger.

The affiliation of an exchange with one of its members that provides inbound access to the exchange—in direct competition with other members of the exchange—raises potential conflicts of interest between the exchange's regulatory responsibilities and its commercial interests, and the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment. In light of the conditions that would be imposed during the interim period that are designed to mitigate potential conflicts of interest and the potential for unfair competitive advantage, the Commission believes it is appropriate and consistent with the Act to allow such a limited, temporary exception.[107]

c. Other PCX Members That Are Related Persons of Archipelago

As noted above in Section II.C.1.c., in addition to its Inbound Router function, Arca Trading provides the ATS OTC function,[108] and Archipelago Securities also provides the DOT function in addition to its Outbound Router function.[109] PCX requests the Commission's approval for an exception for Arca Trading to allow Archipelago to continue to own all of its ownership interest in and operate the ATS OTC function on a pilot basis for a period of 60 days following the Merger. PCX also requests an exception for Archipelago Securities to permit Archipelago to continue to own all of its ownership interest in and operate the DOT function of Archipelago Securities on a pilot basis until the earlier of (1) a period of 60 days following the closing of the Merger, and (2) the closing date of the proposed merger of Archipelago and the NYSE (provided that in no event will PCX or Archipelago request that this exception be extended beyond the closing date of the merger of Archipelago and the NYSE).[110] The Commission believes it is reasonable and consistent with the Act to approve these exceptions on a pilot basis, which will provide the public and other interested parties an opportunity to comment on the exceptions prior to any such exception being made permanent.

With respect to the ATS OTC function, the Commission notes that in its adoption of Regulation ATS, it stated that exchanges could form subsidiaries that operate ATSs registered as broker-dealers. The Commission noted that such subsidiaries would of course be required to become members of a national securities association or another national securities exchange. The Commission also stated that any subsidiary or affiliate ATS could not integrate, or otherwise link the ATS with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction,

[101] The Commission notes that such amendment of the NASD PCX Agreement is required to be filed with the Commission pursuant to Rule 17d–2 under the Act.

[102] In Amendment No. 2, PCX clarified that real-time market surveillance means marketplace regulation and marketplace surveillance, including surveillance and enforcement related to PCXE trading rules, PCX and PCXE rules relating to trading on ArcaEx, and Commission rules relating to trading.

[103] *See supra* note 38 and accompanying text.

[104] *See supra* notes 43 and 44 and accompanying text.

[105] *See* PCXE Rule 14.3.

[106] The Exchange confirmed that Wave and Arca Trading are, and will continue to be during the interim periods, covered by the scope of the NASD PCX Agreement. Telephone conversation between Kathryn Beck, General Counsel, PCX and David Hsu, Special Counsel, Division, Commission, on September 19, 2005.

[107] The Commission believes that an Inbound Router function provided by an affiliated member of an exchange would be a facility of the exchange under Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2), and would be regulated as such.

[108] *See supra* note 48 and accompanying text and Amendment No. 2.

[109] *See supra* note 49 and accompanying text and Amendment No. 2.

[110] *See* Amendment No. 2.

without being considered a facility of the exchange.[111]

Finally, PCX requests the Commission's approval for a temporary exception for Terra Nova until December 31, 2005 to allow Gerald D. Putnam (the Chairman and CEO of Archipelago) to continue to own in excess of 5% of Terra Nova and continue to serve as a director of TAL following the Merger.[112] The Commission believes that such a temporary exception is appropriate and consistent with the Act because it will eliminate the affiliation between Terra Nova and Archipelago but allow Mr. Putnam a reasonable amount of time to effectuate such actions necessary to eliminate the affiliation.

*C. Response to Comments*

The Commission received one comment letter on the proposed rule change.[113] This commenter raises a concern regarding the level of change to the structure of the Exchange's options market that it believes Archipelago intends to undertake once the Merger has been completed, and the fact that Archipelago and PCX have not informed the Commission of their intent in connection with this proposed rule change. In particular, the commenter believes that the intended rule changes will align the PCX market with an existing ''ECN-style'' market structure of ArcaEx. The commenter recommends that the Commission not approve the pending merger while it investigates whether the intended rule changes will benefit the investing public.

Pursuant to Section 19(b)(2) of the Act,[114] the Commission is required to approve a proposed rule change on Form 19b–4 filed by an SRO pursuant to Rule 19b–4 under the Act [115] if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the SRO. PCX is not proposing to change its options market structure in this filing. The Commission has only considered whether the changes proposed by PCX in this rule filing are consistent with the Act. Similarly, the Commission would evaluate any future proposals by PCX to change its options rules pursuant to the statutory standards in Section 19(b)(2) of the Act.[116]

**V. Accelerated Approval of Amendment No. 2**

Pursuant to Section 19(b)(2) of the Act,[117] the Commission may not approve any proposed rule change, or amendment thereto, prior to the thirtieth day after the date of publication of the notice thereof, unless the Commission find good cause for so finding. The Commission hereby find good cause for approving Amendment No. 2 to the proposed rule change prior to the thirtieth day after publishing notice of Amendment No. 2 in the **Federal Register** pursuant to Section 19(b)(2) of the Act.[118] Specifically, in Amendment No. 2, the Exchange: (1) Revised Form 19b–4 to reflect actions by the stockholders of PCXH approving the Merger on September 13, 2005; (2) made certain technical, non-substantive corrections to the text of the proposed rule change; (3) clarified the scope of the term ''real-time market surveillance'' in its discussion of the scope of the NASD PCX Agreement; (4) clarified the relationship between Archipelago and Wave, Archipelago and Terra Nova, Terra Nova and TAL, and Archipelago and White Cap in relation to its requests for temporary exceptions from the PCXH ownership and voting requirements; and (5) provided that the temporary exception it had requested for Wave in the Notice would be subject to a condition that Archipelago will continue to maintain and comply with its existing information barriers. These changes in items (1), (2), (3), and (4) are technical or non-substantive in nature, and the change in item (5) would provide additional safeguards for the proposed exception for Wave's Inbound Router function, and raise no new novel issues.

In Amendment No. 2, the Exchange also included a request for a temporary exception from the PCXH ownership and voting requirements for the Inbound Router function of Arca Trading and the related clearing function performed by Archipelago Securities, subject to certain conditions as outlined above in Section II.C.1.b. The Commission believes that good cause exists to accelerate approval of this exception because it is limited in duration (*i.e.*, Archipelago must divest its ownership interest or cease operations by March 31, 2006 at the latest) and subject to several conditions that are designed to mitigate any potential conflicts of interest between the ownership and operation by Archipelago of the Inbound Router function of Arca Trading and the self-regulatory function of PCX and the operation of ArcaEx, as well as any potential for unfair competitive advantage.

Finally, in Amendment No. 2 the Exchange requested (1) an exception on a 60 day pilot basis for Archipelago to be able to continue to own and operate an ATS for the trading of over-the-counter bulletin board securities not traded on any exchange and (2) an exception on a pilot basis until the earlier of (a) 60 days and (b) the closing of the pending merger between Archipelago and the NYSE for Archipelago to be able to continue to own and operate, through Archipelago Securities, a service that provides direct connectivity to the NYSE through the DOT system. The Commission believes that good cause exists to approve these two exceptions on a pilot basis because the public and other interested parties will have the opportunity to comment on the substance of the exceptions before permanent approval, if permanent approval is requested.

Therefore, the Commission finds that good cause exists to accelerate approval of Amendment No. 2 to the proposed rule change, pursuant to Section 19(b)(2) of the Act.[119]

**VI. Conclusion**

For the foregoing reasons, the Commission finds that the proposed rule change, as amended, is consistent with the requirement of the Act the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,[120] that: (1) The proposed rule change (SR–PCX–2005–90) and Amendment No. 1 thereto are approved; (2) Amendment No. 2 thereto is approved on an accelerated basis; (3) the exception for the ATS OTC Function of Arca Trading is approved on a pilot basis for a period of 60 days following the closing of the Merger; (4) the exception for the DOT Function of Archipelago Securities is approved on a pilot basis until the earlier of (i) a period of 60 days following the closing of the Merger, and (ii) the closing date of the proposed merger of Archipelago and the NYSE; (5) the temporary exception for Wave is approved until December 31, 2005; (6) the temporary exception for the Inbound Router function of Arca Trading and the related clearing function of Archipelago Securities is approved until the earlier of March 31, 2006 and the closing date of the proposed merger of Archipelago and the NYSE; and (7) the temporary exception

[111] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) at 70891.

[112] *See supra* note 45 and accompanying text and Amendment No. 2.

[113] *See supra* note 4.

[114] 15 U.S.C. 78s(b)(2).

[115] 17 CFR 240.19b–4.

[116] 15 U.S.C. 78s(b)(2).

[117] 15 U.S.C. 78s(b)(2).

[118] *Id.*

[119] *Id.*

[120] *Id.*

for Terra Nova is approved until December 31, 2005.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.[121]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. E5–5314 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–52495; File No. SR–Phlx–2005–14]**

## Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Granting Approval to Proposed Rule Change and Amendment No. 1 Thereto Relating to Order Matching at the Opening in PACE

September 22, 2005.

### I. Introduction

On March 10, 2005, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Phlx Rule 229 to permit the PACE System[3] to modify the opening process to match certain orders, described below, to each other, where possible, instead of matching such orders with the specialist. On July 28, 2005, the Phlx filed Amendment No. 1 to the proposed rule change.[4] The proposed rule change, as amended, was published for comment in the **Federal Register** on August 17, 2005.[5] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

### II. Description of the Proposal

Currently, eligible market and limit orders received before the opening of the listing market[6] are guaranteed an execution against the specialist to whom the order was directed (the ''Directed Specialist'')[7] at the open price. The Exchange has proposed to modify the PACE System to match certain eligible orders received before the open against other eligible contra-side orders (as available) at the opening price, rather than execute such orders against the Directed Specialist.[8] The Directed Specialist would continue to provide executions for any orders that would be ineligible for the proposed matching feature (as described below) and also for any imbalance of directed orders resulting from the proposed matching feature. However, the proposal would have the effect of removing the Directed Specialist from interaction with orders received before the open when such orders would be eligible for matching against other orders. The proposal also modifies the conditions for an order to be guaranteed an automatic execution at the listing market's opening price (whether matched against another order or against the Directed Specialist).

*Automatic Execution Guarantee*

Under the proposal, in order to be guaranteed an automatic execution at the listing market's opening price, market orders that are of a size equal to or smaller than the Directed Specialist's automatic execution guarantee size would need to be entered anytime before the actual opening of the applicable listing market, but market orders that are larger than the Directed Specialist's automatic execution guarantee size would need to be entered at least two minutes before the actual opening of the listing market.[9] Limit orders would need to be entered at least two minutes prior to the actual opening on the listing market and to be traded-through by the listing market's opening price in order to receive the automatic execution guarantee. Neither market orders nor limit orders would be eligible for an automatic execution guarantee at the listing market's opening price if they are marked sell short or laid-off by the Directed Specialist.

*Orders Types Eligible for Matching*

Under the proposal, only round-lot market and limit orders would be eligible for matching at the opening price of the listing market. Other order types would not be eligible for the matching feature and would continue to be executed against the Directed Specialist, including: odd-lot orders, partial round-lot all-or-none orders, the odd-lot portion of partial round-lot eligible orders, and round-lot all-or-none orders when a single contra-side order with sufficient volume is not available. In addition, the imbalance of any directed orders that, although eligible for matching, could not match against other orders due to the lack of available contra-orders would be executed against the Directed Specialist.

*Other Changes*

Finally, the proposal would delete existing language in Phlx Rule 229, Supplementary Material .10(b), relating to the size of market and limit orders and the receipt time required to receive the opening price, since the treatment of such orders will be covered in Supplementary Materials .06 and .10(a), and it would also delete Supplementary Material .11 relating to the refusal of orders, as the Phlx believes that specialists today have sufficient methods available to them to manage the risk associated with orders received before the opening.

### III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[10] In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[11] which requires that the rules of an exchange be designed to promote just and equitable principles of trade, to perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission notes that the proposal would remove all size restrictions on orders guaranteed an automatic execution at the opening price, provided that such orders are received within a certain time before the opening of the listing market and are not marked sell short or laid off at another

[121] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] PACE is the Exchange's automated order routing, delivery, execution and reporting system for equities. *See* Phlx Rule 229.

[4] Amendment No. 1, which replaced and superseded the original filing in its entirety, included additional text in the purpose section to further clarify the description and operation of the proposed rule change, and also included a minor edit to the text of Phlx Rule 229.

[5] *See* Securities Exchange Act Release No. 52239 (August 11, 2005), 70 FR 48457 (''Notice'').

[6] The term ''listing market'' refers to the applicable New York listing market.

[7] The term ''Directed Specialist'' has the same meaning as in Phlx Rule 229A(b)(3), when there is more than one specialist assigned in a security. When there is only one specialist assigned in a security, the term Directed Specialist means that sole specialist.

[8] Under the proposal, the Exchange's matching algorithm would sort eligible orders by time priority and descending volume, thereby minimizing the number of different orders that any one order could match against.

[9] Under the proposal, a Directed Specialist could elect to adopt a shorter time threshold for the receipt of orders in all securities traded by the Directed Specialist.

[10] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

market. The Commission further notes that eligible, round-lot market and limit orders would be eligible to be automatically matched against other eligible orders at the opening price, without the participation of the Directed Specialist. The Commission believes that the proposal, by providing the proposed matching feature for eligible customer orders, appears to be reasonably designed to increase the automated handling of customer orders at the opening and reduce the risk of specialists trading ahead of customer orders. The Commission notes that the Exchange has represented that the proposal excludes order types involving odd-lots (odd-lot orders, partial round-lot all-or-none orders, and the odd-lot portion of partial round-lot eligible orders) from the proposed matching feature because such orders could otherwise match against round-lot orders, thereby generating a succession of additional odd-lots and transaction receipts, which would impose an undue transaction cost burden on firms entering round-lot orders. The Commission also notes that the Exchange has represented that all-or-none orders are not eligible for the proposed matching feature when a single contra-side order with sufficient volume is not available in order that, in keeping with the terms of all-or-none orders, such orders may be filled through a single execution. The Commission notes that the Directed Specialist would be obligated to execute all orders that are eligible for an automatic execution guarantee but that are ineligible for the proposed matching feature. The Commission also notes that the Directed Specialist is responsible for providing executions for any imbalance of orders that result from the matching feature. The Commission believes that the proposal appears to be reasonably designed to ensure the execution of orders entitled to an automatic execution guarantee, address the concerns of the Exchange's customers, and promote efficient executions.

## IV. Conclusion

*It is therefore ordered,* pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–Phlx–2005–14), as amended, be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

**Jonathan G. Katz,**

*Secretary.*

[FR Doc. 05–19496 Filed 9–28–05; 8:45 am]

**BILLING CODE 8010–01–P**

## SMALL BUSINESS ADMINISTRATION

### Data Collection Available for Public Comments and Recommendations

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Small Business Administration's intention to request approval on a new and/or currently approved information collection.

**DATES:** Submit comments on or before November 28, 2005.

**ADDRESSES:** Send all comments regarding whether these information collections are necessary for the proper performance of the function of the agency, whether the burden estimates are accurate, and if there are ways to minimize the estimated burden and enhance the quality of the collections, to Carmen-Rosa Torres, Director, Office of Analysis, Planning, and Accountability, Small Business Administration, 409 3rd Street SW., Suite 6000, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Carmen-Rosa Torres, Director, 202–205–6112 *Carmenrosa.torres@sba.gov* Curtis B. Rich, Management Analyst, 202–205–7030 *curtis.rich@sba.sba*.

**SUPPLEMENTARY INFORMATION:**

*Title:* ''Lender Survey''.

*Description of Respondents:* This survey will be administered to representatives of lenders that originate small business loans.

*Form No:* N/A.

*Annual Responses:* 75.

*Annual Burden:* 37.5.

*Title:* ''Assisted Business Survey''.

*Description of Respondents:* This survey will be administered to a random sample of businesses assisted under various SBA programs.

*Form No:* N/A.

*Annual Responses:* 3,000.

*Annual Burden:* 1,000.

**Jacqueline White,**

*Chief, Administrative Information Branch.*

[FR Doc. 05–19513 Filed 9–28–05; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

### CommunityExpress Pilot Program

**AGENCY:** U.S. Small Business Administration (SBA).

**ACTION:** Notice of Pilot Program extension.

**SUMMARY:** This notice announces the extension of SBA's CommunityExpress Pilot Program until November 30, 2005. This extension will allow time for SBA to complete its decisionmaking regarding potential modifications and enhancements to the Program.

**DATES:** The CommunityExpress Pilot Program is extended under this notice until November 30, 2005.

**FOR FURTHER INFORMATION CONTACT:** Charles Thomas, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, Washington, DC 20416; Telephone (202) 205–6490; *charles.thomas@sba.gov.*

**SUPPLEMENTARY INFORMATION:** The CommunityExpress Pilot Program was established in 1999 as a subprogram of the Agency's SBAExpress Pilot Program. Lenders approved for participation in CommunityExpress are authorized to use the expedited loan processing procedures in place for the SBAExpress Pilot Program, but the loans approved under this Program must be to distressed or underserved markets. To encourage lenders to make these loans, SBA provides its standard 75–85 percent guaranty, which contrasts to the 50 percent guaranty the Agency provides under SBAExpress. However, under CommunityExpress, participating lenders must arrange and, when necessary, pay for appropriate technical assistance for any borrowers under the program. Maximum loan amounts under this Program are limited to $250,000.

The extension of this Program until November 30, 2005, will allow SBA to more fully evaluate the results and impact of the Program and to consider possible changes and enhancements to the Program. It will also allow SBA to further consult with its lending partners and the small business community about the Program.

(Authority: 13 CFR 120.3)

**Michael W. Hager,**

*Associate Deputy Administrator.*

[FR Doc. 05–19442 Filed 9–28–05; 8:45 am]

**BILLING CODE 8025–01–P**

## SMALL BUSINESS ADMINISTRATION

### Export Express Pilot Program

**AGENCY:** U.S. Small Business Administration (SBA).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

**ACTION:** Notice of Pilot Program extension.

**SUMMARY:** This notice announces the extension of SBA's Export Express Pilot Program until November 30, 2005. This extension will allow time for SBA to complete its decision making regarding potential modifications and enhancements to the Program.

**DATES:** The Export Express Pilot Program is extended under this notice until November 30, 2005.

**FOR FURTHER INFORMATION CONTACT:** Charles Thomas, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, Washington, DC 20416; Telephone (202) 205–6490; *charles.thomas@sba.gov.*

**SUPPLEMENTARY INFORMATION:** The Export Express Pilot Program was established as a subprogram of the Agency's SBAExpress Pilot Program. It was established in 1998 to assist current and prospective small exporters, particularly those needing revolving lines of credit. Export Express generally conforms to the streamlined procedures of SBAExpress and carriers SBA's full 75–85 percent guaranty. The maximum loan amount under this Program is limited to $250,000. The extension of this Program until November 30, 2005, will allow the SBA to more fully evaluate the results and impact of the Program and to consider possible changes and enhancements to the Program. It will also allow SBA to further consult with its lending partners and the small business community about the Program.

(Authority: 13 CFR 120.3)

**Michael W. Hager,**

*Associate Deputy Administrator.*

[FR Doc. 05–19441 Filed 9–28–05; 8:45 am]

**BILLING CODE 8025–01–M**

## OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

### Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment

**AGENCY:** Office of the United States Trade Representative

**ACTION:** Request for written submissions from the public.

**SUMMARY:** Section 182 of the Trade Act of 1974 (Trade Act) (19 U.S.C. 2242), requires the United States Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Section 182 is commonly referred to as the ''Special 301'' provision of the Trade Act. In addition, USTR is required to determine which of those countries should be identified as Priority Foreign Countries. On April 30, 2005, USTR announced the results of the 2005 Special 301 review and stated that Out-of-Cycle Reviews (OCRs) would be conducted for Russia, Canada, Indonesia and the Philippines. USTR will conduct these OCRs in early 2006. USTR requests written comments from the public concerning the acts, policies, and practices relevant for this review under Section 182 of the Trade Act.

**DATES:** Submissions must be received on or before 5 p.m. on Friday, December 2, 2005.

**ADDRESSES:** Comments should be addressed to Sybia Harrison, Special Assistant to the Section 301 Committee, and sent (i) electronically, to *FR0528@ustr.gov,* with ''Special 301 Out-of-Cycle Review: Russia, Canada, Indonesia and the Philippines'' in the subject line, or (ii) by fax, to (202) 395–9458, with a confirmation copy sent electronically to the e-mail address above.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Choe Groves, Director for Intellectual Property and Chair of the Special 301 Committee, Office of the United States Trade Representative, (202) 395–4510.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 182 of the Trade Act, USTR must identify those countries that deny adequate and effective protection for intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Those countries that have the most onerous or egregious acts, policies, or practices and whose acts, policies, or practices have the greatest adverse impact (actual or potential) on relevant U.S. products may be identified as Priority Foreign Countries. Acts, policies, or practices that are the basis of a country's designation as a Priority Foreign Country are normally the subject of an investigation under the Section 301 provisions of the Trade Act.

On April 30, 2005, USTR announced the results of the 2005 Special 301 review, including an announcement that Out-of-Cycle Reviews (OCRs) would be conducted for Russia, Canada, Indonesia and the Philippines. Additional countries may also be reviewed as a result of the comments received pursuant to this notice, or as warranted by events.

**Requirements for Comments**

Comments should include a description of the problems experienced, and the effect of the acts, policies, and practices on U.S. industry. Comments should be as detailed as possible and should provide all necessary information for assessing the effect of the acts, policies, and practices. Any comments that include quantitative loss claims should be accompanied by the methodology used in calculating such estimated losses.

Comments must be in English. No submissions will be accepted via postal service mail. Documents should be submitted as either WordPerfect, MS Word, or text (.TXT) files. Supporting documentation submitted as spreadsheets are acceptable as Quattro Pro or Excel files. A submitter requesting that information contained in a comment be treated as confidential business information must certify that such information is business confidential and would not customarily be released to the public by the submitter. A non-confidential version of the comment must also be provided. For any document containing business confidential information, the file name of the business confidential version should begin with the characters ''BC-'', and the file name of the public version should begin with the character ''P-''. The ''P-'' or ''BC-'' should be followed by the name of the submitter. Submissions should not include separate cover letters; information that might appear in a cover letter should be included in the submission itself. To the extent possible, any attachments to the submission should be included in the same file as the submission itself, and not as separate files.

All comments should be addressed to Sybia Harrison, Special Assistant to the Section 301 Committee, and sent (i) electronically, to *FR0528@ustr.gov,* with ''Special 301 Out-of-Cycle Review: Russia, Canada, Indonesia and the Philippines'' in the subject line, or (ii) by fax, to (202) 395–9458, with a confirmation copy sent electronically to the e-mail address above.

**Public Inspection of Submissions**

Within one business day of receipt, non-confidential submissions will be placed in a public file open for inspection at the USTR reading room, Office of the United States Trade Representative, Annex Building, 1724 F Street, NW., Room 1, Washington, DC. An appointment to review the file must be scheduled at least 48 hours in advance and may be made by calling Jacqueline Caldwell at (202) 395–6186.

The USTR reading room is open to the public from 10 a.m. to noon and from 1 p.m. to 4 p.m., Monday through Friday.

**Jennifer Choe Groves,**

*Director for Intellectual Property and Chair of the Special 301 Committee.*

[FR Doc. 05–19490 Filed 9–28–05; 8:45 am]

**BILLING CODE 3190–W5–P**

## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

**[Docket No. FMCSA–2005–22417]**

### Notice of Intent To Survey Medical Examiners Who Certify the Physical Qualifications of Commercial Motor Vehicle Drivers

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice and request for comments.

**SUMMARY:** In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, this notice announces the intention of FMCSA to request approval from the Office of Management and Budget (OMB) for an information collection associated with the agency's medical examiner Role Delineation Study. This information collection would gather data on the role of medical examiners and provide medical examiners (medical doctors (MDs), doctors of osteopathy (DOs), doctors of chiropractic (DCs), physician assistants (PAs) and advance practice nurses (APNs)) who perform FMCSA physical examinations of commercial motor vehicle (CMV) drivers a means of participating in an assessment of the knowledge, skills, and abilities necessary to effectively determine if a CMV driver's health meets Federal physical qualifications standards. The data obtained from the Role Delineation Study and other sources would be used to support the development of the National Registry of Certified Medical Examiners (NRCME) program.

**DATES:** Comments must be submitted on or before November 28, 2005.

**ADDRESSES:** You may submit comments identified by Docket Number FMCSA–2005–22417 by any of the following methods:

• Web site: *http://dms.dot.gov.*

Follow the instructions for submitting comments on the DOT electronic docket site.

• *Fax:* 1–202–493–2251.

• *Mail:* Docket Management System (DMS) Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.

• *Hand Delivery:* Room PL–401 on plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

• *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name and docket number of the notice. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided.

*Docket:* For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Privacy Act:* Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, at 65 FR 19477 or you may visit *http://dms.dot.gov*.

**FOR FURTHER INFORMATION CONTACT:** For information, contact Dr. Mary D. Gunnels, Office of Bus and Truck Standards and Operations, Physical Qualifications Division, 202–366–4001. Office hours are from 8:30 a.m. to 5 p.m., Eastern time, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

*Title:* Notice of Intent to Survey Medical Examiners Who Certify the Physical Qualifications of Commercial Motor Vehicle Drivers.

#### Background

Section 4116 of The Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) (Public Law 109–59) requires the Secretary of Transportation ''to establish and maintain a current national registry of medical examiners who are qualified to perform examinations and issue medical certificates.'' To implement this requirement, FMCSA is developing the National Registry program that was announced at a June 22, 2005, Public Meeting in Arlington, Virginia (70 FR 28596; May 18, 2005). The NRCME will be comprised, in part, of a training and testing program that will include a database of medical examiners who conduct medical examinations of interstate CMV drivers and effectively determine their physical qualifications to operate such vehicles in interstate commerce as defined in 49 CFR 391.41.

Once the program is implemented, FMCSA would only accept medical examinations conducted by NRCME medical examiners. The NRCME program would require training using a standardized curriculum, a certification examination, and procedures to maintain the quality of the program in accordance with national accreditation standards. The Role Delineation Study is a critical component of developing a standardized training curriculum and a valid, reliable and fair certification examination. The goal of the Role Delineation Study is to inform the policies that guide the NRCME program in accordance with national accreditation standards. The study is an assessment of the knowledge, skills, and abilities necessary for a medical examiner to perform competently. The Role Delineation Study incorporates the following components: (1) Develop a task list through a variety of techniques; (2) measure agreement on each task in the list by a representative sample of medical examiners; (3) disqualify tasks lacking sufficient agreement; (4) identify critical tasks; and (5) create specifications for an examination. The information derived from the Role Delineation Study is necessary to form the basis of a professionally and legally sound quality management system that supports a national accreditation of the certification program. A survey of medical examiners is one of the techniques for gathering data from FMCSA medical examiners for the Role Delineation Study.

*Respondents:* Medical examiners (MDs, DOs, DCs, PAs, and APNs) who are currently performing FMCSA physical examinations of CMV drivers.

*Estimated Average Burden per Response:* The estimated average burden per response for each survey is 30 to 60 minutes.

*Estimated Total Annual Burden:* The estimated total annual burden is 500 to 1000 hours for the information collection based on the following requirement for statistical significance: 200 responses for each of the five medical examiner professional categories; [1000 respondents per survey

× 30/60 minutes per respondent = 500 to 1000 hours].

*Frequency:* Data collection in support of program content validation is typically done every few years because practice standards change and evolve.

**Public Comments Invited**

Interested parties are invited to send comments regarding any aspect of this information collection, including but not limited to: (1) The necessity and utility of the information collection for the proper performance of the functions of FMCSA and specifically the conduct of the Role Delineation Study; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB's clearance for this information collection.

Issued on: September 22, 2005.

**Rose A. McMurray,**

*Associate Administrator for Policy and Program Development.*

[FR Doc. 05–19460 Filed 9–28–05; 8:45 am]

**BILLING CODE 4910–EX–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[OMB Control No. 2900–0635]**

### Agency Information Collection Activities Under OMB Review

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521) this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before October 31, 2005.

**FOR FURTHER INFORMATION CONTACT:** Denise McLamb, Records Management Service (005E3), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 565–8374, FAX (202) 565–6950 or e-mail: *denise.mclamb@mail.va.gov.* Please refer to ''OMB Control No. 2900–0635.''

Send comments and recommendations concerning any aspect of the information collection to VA's OMB Desk Officer, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395–7316. Please refer to ''OMB Control No. 2900–0635'' in any correspondence.

**SUPPLEMENTARY INFORMATION:**

*Title:* Suspension of Monthly Check, VA Form 29–0759.

*OMB Control Number:* 2900–0635.

*Type of Review:* Extension of currently approved collection.

*Abstract:* When a beneficiary's monthly insurance check is not cashed within one year from the issued date, the Department of Treasury returns the funds to VA. VA Form 29–0759 is used to advise the beneficiary that his or her monthly insurance checks have been suspended and to request the beneficiary to provide a current address or if desired a banking institution for direct deposit for monthly checks.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on June 22, 2005 at pages 36234–36235.

*Affected Public:* Individuals or households.

*Estimated Annual Burden:* 200 hours.

*Estimated Average Burden Per Respondent:* 10 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Respondents:* 1,200.

Dated: September 22, 2005.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Records Management Service.*

[FR Doc. E5–5319 Filed 9–28–05; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

**[[OMB Control No. 2900–0381]**

### Proposed Information Collection Activity: Proposed Collection; Comment Request

**AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to determine the holder's election to convey and transfer foreclosed property to VA.

**DATES:** Written comments and recommendations on the proposed collection of information should be received on or before November 28, 2005.

**ADDRESSES:** Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0381'' in any correspondence.

**FOR FURTHER INFORMATION CONTACT:** Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

**SUPPLEMENTARY INFORMATION:** Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

*Title:* Notice for Election to Convey and/or Invoice for Transfer of Property, VA Form 26–8903.

*OMB Control Number:* 2900–0381.

*Type of Review:* VA Form 26–8903 serves four purposes: holder's election to convey, invoice for the purchase

price of the property, VA's voucher for authorizing payment to the holder, and establishment of VA's property records. The form provides holders, who elected to convey properties to VA, with a convenient and uniform way of notifying VA regarding foreclosed GI home loan.

*Affected Public:* Business or other for-profit.

*Estimated Annual Burden:* 4,167 hours.

*Estimated Average Burden Per Respondent:* 10 minutes.

*Frequency of Response:* On occasion.

*Estimated Number of Total Respondents:* 25,000.

Dated: September 22, 2005.

By direction of the Secretary.

**Denise McLamb,**

*Program Analyst, Records Management Service.*

[FR Doc. E5–5320 Filed 9–28–05; 8:45 am]

**BILLING CODE 8320–01–P**

## DEPARTMENT OF VETERANS AFFAIRS

### Advisory Committee on CARES Business Plan Studies, Notice of Rescheduled Meeting

The Department of Veterans Affairs (VA) gives notice under the Public Law 92–463 (Federal Advisory Committee Act) that the possible impact of Hurricane Rita has forced the rescheduling of the Advisory Committee on CARES Business Plan Studies meeting previously scheduled for Tuesday, September 27, 2005, at Waco Campus Study, Waco Convention Center, 100 Washington Avenue, Waco, Texas 76702, from 8 a.m. until 6 p.m. The rescheduled meeting will be held on Tuesday, October 4, 2005, at the same location and time as noted above. The meeting is open to the public.

The purpose of the Committee is to provide advice to the Secretary of Veterans Affairs on proposed business plans at those VA facility sites identified in May 2004 as requiring further study by the Capital Asset Realignment for Enhanced Services (CARES) Decision document.

The agenda will include a discussion of the potential CARES Business Plan options for each site. The options have been developed by the VA contractor. The agenda will provide time for public comments on the options and for discussion of which options should be considered by the Secretary for further analysis and development in the next stage of the Business Plan Option development process.

Interested persons may attend and present oral or written statements to the Committee. For additional information regarding the meetings, please contact Mr. Jay Halpern, Designated Federal Officer, (00CARES), 810 Vermont Avenue, NW., Washington, DC 20024 by phone at (202) 273–5994, or by e-mail at *jay.halpern@va.gov.*

Dated: September 23, 2005.

By direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 05–19523 Filed 9–28–05; 8:45 am]

**BILLING CODE 8320–01–M**

## DEPARTMENT OF VETERANS AFFAIRS

### Veterans' Advisory Committee on Education; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Veterans' Advisory Committee on Education will meet on October 13–14, 2005, at the Key Bridge Marriott, 1401 Lee Highway, Arlington, VA 22209. On October 13, the session will begin at 12:30 p.m. and end at 4 p.m. On October 14, the session will begin at 8:30 a.m. and end at 4 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of education and training programs for veterans, servicepersons, reservists, and dependents of veterans under Chapters 30, 32, 35, and 36 of Title 38, and Chapter 1606 of Title 10, United States Code.

On October 13, the meeting will begin with opening remarks and an overview by Mr. James Bombard, Committee Chair. The Committee will discuss the total force GI Bill concept, use of private and corporate funds to support educational programs, claims processing improvements, and comparison of GI Bill rates to the cost of attending a 4-year public college. On October 14, the Committee will participate in a panel discussion with the National Association of Veterans' Program Administrators (NAVPA). The Committee will then review and summarize issues raised during this meeting. Oral statements will be heard at 1 p.m.

Interested persons may file written statements to the Committee before the meeting, or within 10 days after the meeting, with Mrs. Judith B. Timko, Designated Federal Officer, Department of Veterans Affairs, Veterans Benefits Administration (225B), 810 Vermont Avenue, NW., Washington, DC 20420. Any member of the public wishing to attend the meeting should contact Mrs. Timko or Mr. Michael Yunker at (202) 273–7187.

Dated: September 21, 2005.

By Direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 05–19406 Filed 9–28–05; 8:45 am]

**BILLING CODE 8320–01–M**

## DEPARTMENT OF VETERANS AFFAIRS

### Veterans' Disability Benefits Commission Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Veterans' Disability Benefits Commission has scheduled a meeting for October 14, 2005, in the hearing room 334 of the House Committee on Veterans' Affairs, at the Cannon House Office Building, Washington, DC 20515. The meeting will begin at 9 a.m. and end at 4 p.m. The meeting is open to the public.

The purpose of the Commission is to carry out a study of the benefits under the laws of the United States that are provided to compensate and assist veterans and their survivors for disabilities and deaths attributable to military service.

The agenda for the meeting will include the opportunity to discuss research questions and issues for further study. The Statements of Work under development for contracting with the Institute of Medicine of the National Academies of Science, as required by the Commission's statutory authority, and the Center for Naval Analysis will be discussed and approved.

Interested persons may attend and present oral statements to the Commission. Time for oral presentations will be limited to five minutes or less, depending on the number of participants. Interested parties may provide written comments for review by the Commission prior the meeting, by e-mail to: *veterans@vetscommission.intranets.com* or by mail to: Mr. Ray Wilburn, Executive Director, Veterans' Disability Benefits Commission, 1101 Pennsylvania Avenue, NW., 5th Floor, Washington, DC 20004.

Dated: September 22, 2005.

By direction of the Secretary.

**E. Philip Riggin,**

*Committee Management Officer.*

[FR Doc. 05–19522 Filed 9–28–05; 8:45 am]

BILLING CODE 8320–01–M

Federal Register

Thursday,
September 29, 2005

# Part II

# Department of the Interior

## Fish and Wildlife Service

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Final Rule**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018–AT89**

## Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are designating critical habitat for the Pacific coast population of the western snowy plover (*Charadrius alexandrinus nivosus*) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 12,145 acres (ac) (4,921 hectares (ha)) fall within the boundaries of the critical habitat designation. The critical habitat is located within 3 states, and a total of 20 counties. The county breakdown by State is as follows: California—San Diego, Orange, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Monterey, Santa Cruz, San Mateo, Marin, Mendocino, Humboldt, Del Norte; Oregon—Curry, Coos, Douglas, Lane, Tillamook; and Washington—Pacific, Grays Harbor.

**DATES:** This rule becomes effective on October 31, 2005.

**ADDRESSES:** Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521 (telephone 707/822–7201). The final rule, economic analysis, and supporting Geographic Information System (GIS) reports will also be available via the Internet at *http://www.fws.gov/pacific/sacramento/default.htm.*

**FOR FURTHER INFORMATION CONTACT:** Michael Long, Field Supervisor, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521 (telephone 707/822–7201; facsimile 707/822–8411).

**SUPPLEMENTARY INFORMATION:**

### Designation of Critical Habitat Provides Little Additional Protection to Species

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit to the species most in need of protection.

*Role of Critical Habitat in Actual Practice of Administering and Implementing the Act*

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, ''Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7.'' Currently, only 473 species or 38 percent of the 1,253 listed species in the U.S. under the jurisdiction of the Service have designated critical habitat.

We address the habitat needs of all 1,253 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court of Appeals for the Fifth Circuit, *Sierra Club* v. *U.S. Fish and Wildlife Service et al.*, F.3d 434 and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force* v. *United States Fish and Wildlife Service*). In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

*Procedural and Resource Difficulties in Designating Critical Habitat*

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result of this consequence, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court-ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially imposed deadlines. This situation in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the costs of preparation and publication of the designation, the analysis of the economic effects and the costs of requesting and responding to public comments, and, in some cases, the costs of compliance with National Environmental Policy Act. None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and these associated costs directly reduce the scarce funds available for direct and tangible conservation actions.

**Background**

Background information on the Pacific coast population of the western snowy plover (Pacific Coast WSP) can be found in our final rule listing of the Pacific Coast WSP, published in the **Federal Register** (FR) on March 5, 1993 (58 FR 12864), and our recent proposal of critical habitat for this population, published on December 17, 2004 (69 FR 75608). Additional background information is also available in our previous final designation of critical habitat for the Pacific Coast WSP, published on December 7, 1999 (64 FR 68508).

**Previous Federal Actions**

For a discussion of previous Federal actions regarding the Pacific Coast WSP, please see our final rule listing the population, published on March 5, 1993 (58 FR 12864), our recent proposal of critical habitat for this population, published on December 17, 2004 (69 FR 75608), and the December 7, 1999, final rule to designate critical habitat for the Pacific coast population of the western snowy plover (64 FR 68508). The December 7, 1999, was remanded and partially vacated by the United States District Court for the District of Oregon on July 2, 2003, for the Service to reconsider the designation and conduct a new analysis of economic impacts (*Coos County Board of County Commissioners et. al.* v. *Department of the Interior et al.*, CV 02–6128, M. Hogan). The court set a deadline of December 1, 2004, for submittal of a new proposed critical habitat designation to the Office of the Federal Register; the proposed rule was published on December 17, 2004 (69 FR 75608). On August 16, 2005, we published in the FR (70 FR 48094) a notice of availability for the draft economic analysis associated with the proposed rule and we reopened the comment period on the proposed rule for 30 days. The court-established deadline for submittal of the final designation is September 20, 2005. This final rule complies with the September 20, 2005, deadline.

In August 2002, we received a petition to delist the Pacific Coast WSP from the Surf Ocean Beach Commission of Lompoc, California. The City of Morro Bay submitted largely the same petition dated May 30, 2003. On March 22, 2004, we published a notice that the petition presented substantial information to indicate that delisting may be warranted (69 FR 13326). We are currently conducting both a 12-month and a 5-year status review of the population under sections 4(b)(3)(A), 4(b)(3)(B) and 4(c)(2) of the Act, in order to issue the finding required by section 4(b)(3)(B) in response to the petitions.

**Summary of Comments and Recommendations**

We requested written comments from the public on the proposed designation of critical habitat for the Pacific Coast WSP in the proposed rule published on December 17, 2004 (69 FR 75608). We also contacted the appropriate Federal, State, and local agencies; Tribes; scientific organizations; and other interested parties and invited them to comment on the proposed rule. We received two requests for a public hearing or ''workshop'' prior to the published deadline. Public meetings were held in Tomales, California, and Crescent City, California, on February 14, 2005, and March 8, 2005, respectively. The initial comment period closed on February 15, 2005. A second comment period for the draft Economic Analysis (DEA) was open from August 16, 2005 to September 15, 2005. All comments and new information received during the two comment periods have been incorporated into this final rule as appropriate.

A total of 1,055 commenters responded during the two comment periods, including 8 Federal agencies, 4 State agencies, 17 local agencies, 21 organizations, and 1005 individuals. Form letters attributed the most comments on the proposed Lake Earl unit (CA 1), and comment cards and a petition accounted for most of the comments regarding the proposal of Dillon Beach (CA 7). Thirty-four commenters submitted two separate sets of comments. During the comment period from December 17, 2004, to February 15, 2005, we received 36 comments directly addressing the proposed critical habitat designation and DEA: 1 from a State agency, 6 from local agencies, and 29 from organizations and individuals.

Most comments did not support designation of critical habitat. The vast majority of comments objected to the designation of Dillon Beach (CA 7) and Lake Earl (CA 1). Five hundred ninety petition signatures and form letters objected to designation of Dillon Beach (CA 7) as critical habitat, and 117 form letters opposed designation of the Lake Earl unit (CA 1). The petition and form letters associated with these 2 units skewed the overall support for designation; representing approximately 67 percent of the comments received. We reviewed all comments for substantive information and new data regarding the listed population and its critical habitat. Comments containing substantive information have been grouped together by issue and are addressed in the following summary. All comments and information have been incorporated into the final rule as appropriate.

**Peer Review**

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited independent opinions from at least three knowledgeable individuals who have expertise with the species, the geographic region where the species occurs, and/or familiarity with the principles of conservation biology. Of the five individuals contacted, three responded. The peer reviewers generally supported the proposal and provided us with comments which are included in the summary below and incorporated into the final rule, as appropriate. Unless otherwise noted, the peer review commented on our proposed rule published December 17, 2004. Subsequent changes to our proposal reflected in the final rule resulting from comments received during the second comment period did not receive peer review comment.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding critical habitat for the western snowy plover, and addressed them in the following summary.

*Peer Reviewer Comments*

1. *Comment:* A peer reviewer who conducts shorebird research in northern California through an academic institution agreed with the general biology presented in the proposed rule; however, the reviewer felt that describing the Pacific Coast WSP's social system as territorial was misleading. Although true for breeding areas where the densities of nesting plovers is high, the reviewer stated that plovers in many parts of the Pacific Coast WSP's range do not defend a well-defined space (*i.e.* territory). This point may be important when estimating the number of individual breeders that can be supported by an area of particular size.

*Our Response:* We agree with the peer reviewer regarding the territorial nature of the Pacific Coast WSP, and his point relative to estimating the number of breeders capable of using a specified area. Our estimates provided in the unit descriptions were based on the best historical information we had from surveys conducted in the late 1970s. It is unknown if those estimates were

based on an already declining population, or a population that was at carrying capacity. In addition, changing conditions in the dynamic habitats preferred by the Pacific Coast WSP likely affects an area's capacity to support breeding plovers.

2. *Comment:* One peer reviewer is investigating the importance of social attraction in relation to the settlement of inexperienced Pacific Coast WSPs (*i.e.* first-time breeders). Preliminary data from Coal Oil Point suggest that social factors play a role in attracting plovers to nest in an area. If true, the management of wintering flocks may be important relative to determining where plovers nest (*e.g.* Coal Oil Point Preserve at U.C. Santa Barbara, California).

*Our Response:* We agree with the commenter's preliminary assessment of the Coal Oil Point Preserve study. Our designation of critical habitat recognizes the importance of both wintering and breeding areas.

3. *Comment:* Two of the peer reviewers commented on our proposal to designate critical habitat only in areas currently occupied, or occupied at the time of listing. Specifically, the 1993 listing was based, in part, on the absence of breeding plovers at formerly occupied sites, and the former critical habitat designation in 1999 made use of former and current site (1998) occupancy. Birds absent from formerly occupied sites may be an outcome of low population size, not necessarily because habitat has become unsuitable at a site. The proposed units place a higher emphasis on occupied sites than unoccupied. As the Pacific Coast WSP recovers, it will presumably need areas in which to expand; some of which are currently suitable, but unoccupied.

*Our Response:* Although we acknowledge that unoccupied areas may be important for the conservation of many species, the Service determined that no unoccupied units were essential for conservation of this DPS.

4. *Comment:* A peer reviewer suggested that the Eel River gravel bars below (*i.e.* downstream) of Fernbridge be included as designated critical habitat due to their importance as breeding habitat both locally, and in northern California and southern Oregon region.

*Our Response:* We acknowledge the importance of the lower gravel bars on the Eel River to plover conservation in northern California; however, our data show that the pre-listing discovery of plovers on the Eel River system were above Fernbridge, and subsequent data from the mid to late 1990s indicates that most plover use was also between Fernbridge and the Van Duzen River. We also acknowledge that plover surveys outside of the area proposed for critical habitat (CA 4D) were inadequate during that time period. Without supporting data, we did not propose the lower portions of the Eel River as critical habitat.

*Comments From States*

Section 4(i) of the Act states, if a State agency files comments disagreeing with a proposed regulation, and the Service issues a final regulation in conflict with the State's comments, or fails to adopt a regulation petitioned by a State agency, the Secretary shall submit to the State agency a written justification for her failure to adopt regulation consistent with the agency's comments or petition. Comments received from States regarding the proposal to designate critical habitat for the western snowy plover are addressed below.

5. *State Comment:* The California Department of Boating and Waterways commented that designation of critical habitat at Dillon Beach would restrict and prohibit boat launching along the beach and at the Lawson's Landing facility, resulting in a significant fiscal impact.

*Our Response:* Critical habitat has been designated at the proposed location since 1999 (64 FR 68508). The draft economic analysis for the proposed critical habitat rule (70 FR 48094) differs from the State's assessment, and concludes there is no significant economic impact at the proposed Dillon Beach unit. However, this unit was excluded from critical habitat designation under section 4(b)(2) of the Act (*see* section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

6. *State Comment:* The Oregon Department of Fish and Wildlife (ODFW) supports the proposed designations in occupied units with the exception of unit boundaries for OR 8A and OR 10A. The State would like those unit boundaries to more closely coincide with the State's draft HCP. Additionally, ODFW proposes designation of Bayocean and Clatsop River Spit as critical habitat.

*Our Response:* Where possible, unit boundaries have been adjusted to conform more closely to the management boundaries presented in the State's draft HCP. Bayocean Spit (OR 3) is designated as critical habitat. We believe that ODFW was referring to the Columbia River Spit regarding their comment on the Clatsop River Spit because of the underlying federal ownership at that location. We are not designating the Columbia River Spit (subunit OR 1A in the proposed rule) because it was determined not to be essential to the conservation of the species.

7. *State Comment:* The Oregon Parks and Recreation Department also generally supported designation of the proposed units; however, believes that only the occupied units should be designated to conform to the State's HCP effort.

*Our Response:* We have made adjustments to our occupied proposed units to have them more closely aligned with the State's HCP effort.

*Comments Related to Previous Federal Actions, the Act, and Implementing Regulations*

8. *Comment:* Several commenters noted that the Service has pending action on the 12-month finding for a petition to delist the Pacific Coast WSP as a threatened species.

*Our Response:* We are currently in the process of completing our status review for this species. The court's deadline for completing this designation does not permit us to take into account whatever actions, if any, might ultimately result from our status review. If we conclude that the species remains in need of the protections of the Act, the critical habitat designated here will remain in place. If we determine that the species is not in need of the protection of the Act, and ultimately remove it from the list, then this critical habitat designation would be vacated.

9. *Comment:* Several commenters indicated that the Service was violating the National Environmental Policy Act (NEPA) by not preparing an environmental assessment or environmental impact statement on the proposed designation of critical habitat for the Pacific Coast WSP.

*Our Response:* It is our position that we do not need to comply with NEPA in connection with designating critical habitat under the Act outside the jurisdictional areas of the Tenth Circuit Court. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld by the Ninth Circuit Court (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

10. *Comment:* A commenter stated that the Service's contention that several areas could be excluded because ''existing management is sufficient to conserve the species'' is incorrect. They state that areas where management activities are being implemented to conserve the plover by definition ''require special management

considerations or protection.'' Otherwise, management activities would not have been implemented (*e.g., Center for Biological Diversity* v. *Norton*, 240 F. Supp 2d 1090 (D. Az. 2003)). They also state that excluding areas under section 4(b)(2) based on the Service's conclusion that the benefits of designating any area as critical habitat is insignificant, is also incorrect. They maintain that critical habitat designation can provide significant protection to a species' habitat, particularly as that habitat pertains to recovery (as opposed to mere survival) (*see Natural Resources Defense Council* v. *Department of Interior*, 113 F. 3d 1121, 1125–1127 (9th Cir. 1997); Conservation Council for *Hawaii* v. *Babbitt*, 2 F. Supp. 2d 1280, 1285–1286 (D. Ha. 1998)).

*Our Response:* Rationale for any exemptions and exclusions of particular areas have been included in this document. We believe that the commenter has oversimplified the process by which lands are determined to be included, exempted, or excluded from a critical habitat determination. It is incorrect to state that the Service views the all benefits of designating critical habitat in any particular area as insignificant. Our analyses under section 4(b)(2) of the Act weigh the benefits of exclusion against the benefits of inclusion and determine within any particular area whether it is appropriate to exclude.

11. *Comment:* A commenter disagreed with the statement in the proposed rule, that ''In 30 years of implementing the Act the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species * * *'' The commenter stated that the proposal includes absolutely no evidence to bolster these assertions, which are inconsistent with recent, controlling judicial decisions, congressional intent, and sound science. They asserted that the fact that the Service's critical habitat decisions are driven by lawsuits and court-ordered deadlines is irrelevant to the Service's mandatory obligation to designate critical habitat for the plover and other listed species. They also assert that the Service's budget requests typically fall short of the amount of money necessary to address the backlog of listing and critical habitat, and that limited resources should not be used as an excuse for not designating critical habitat.

*Our Response:* Comment noted. As discussed in the sections ''Designation of Critical Habitat Provides Little Additional Protection to Species,'' ''Role of Critical Habitat in Actual Practice of Administering and Implementing the Act,'' and ''Procedural and Resource Difficulties in Designating Critical Habitat'' and other sections of this and other critical habitat designations, we believe that, in most cases, conservation mechanisms provided through section 7 consultations, the section 4 recovery planning process, the section 9 protective prohibitions of unauthorized take, section 6 funding to the States, the section 10 incidental take permit process, and cooperative programs with private and public landholders and tribal nations provide greater incentives and conservation benefits than does the designation of critical habitat.

12. *Comment:* A commenter stated that the Service improperly excluded habitat areas that are essential to the conservation of the species and that were included in the 1999 designation because they did not qualify based on either the criteria for breeding sites or the criteria for wintering sites. The Service failed to provide an adequate explanation of these criteria or any justification for the application of the criteria. Any areas included in the 1999 designation that are not included in the proposed designation must be identified and the reasons for the reversal must be explained. They state that an agency changing a prior decision must apply a reasoned analysis.

*Our Response:* The Service in issuing this new designation of critical habitat for the West Coast WSP conducted a new evaluation in order to determine what habitat features are essential. Further, new information has become available since the previous designation of critical habitat. We do not believe it is necessary to identify all changes from the previous CH designation; this new designation supercedes the previous designation. We also believe that a reasoned analysis is provided to justify the final designation of critical habitat for this population.

*Comments Related to Site-Specific Areas and Unoccupied Areas Identified for Possible Inclusion*

13. *Comment:* One commenter stated that the Service's assertion that human activity is the primary threat to plovers is erroneous as animal predators are more responsible for plover kills. The commenter opines that the Service should focus its efforts on predator controls over global land use and development restrictions. Another commenter states that human activity reduces the adverse effects of predators and increases the plover's success.

*Our Response:* We agree with the commenter that predators may directly kill and injure more plovers than humans do. However, we don't agree that human activity in an area reduces the adverse effects of predators on plovers. Red foxes, crows, and ravens all may be equally or more effective at preying upon plovers in areas which are subject to human activity; plovers in contact with humans are probably more likely to be flushed from their nests and subject to subsequent predation. We do agree that a reduction of predation is beneficial to plovers; nest exclosures, predator-proof trash receptacles, and both lethal and non-lethal control of predators have been successful in reducing the impacts of predators on plover reproduction and survival. We believe that effective conservation measures for enhancing reproduction and survival can include a combination of actions to reduce both predator and human effects, depending upon the specific threats which need to be addressed.

14. *Comment:* Two commenters recommended that Clatsop Spit (OR–1) be considered occupied because the Necanicum River Spit (OR–1B) had confirmed breeding plovers in 2000 and 2002.

*Our Response:* Our definition of occupancy required that the unit be occupied by snowy plovers at the time of listing. The definition of critical habitat in the ESA refers to habitat occupied at the time of listing, and Congress has established different criteria for designating habitat not occupied at the time of listing. Monitoring data from 1991 to 1995 indicate that the area in question was likely unoccupied in 1993 at the time of the plover's listing. Consequently, critical habitat units that were unoccupied during that period, but later occupied, were considered unoccupied for the purposes of this designation. The units described above were not designated as critical habitat because they were not found to be essential to the conservation of the species.

15. *Comment:* One commenter believed that Sand Lake North (OR–5A) should not be included in the critical habitat designation because it was viewed as having little recovery benefit in the draft Oregon coast-wide Habitat Conservation Plan (DHCP) process.

*Our Response:* We agree with the commenter. Sand Lake North (OR–5A) has not been designated as critical habitat.

16. *Comment:* Three commenters recommended adjusting the northern boundary of the Siltcoos River Spit unit (OR–8A) to correspond with the edge of the dry sand nesting season restriction that is approximately 0.6 mile (0.96 kilometer) north of the Siltcoos River

mouth. A separate commenter noted that the ''breach'' just north of the Siltcoos River is a winter site that warrants special management consideration.

*Our Response:* We agree with the commenters, and have adjusted the northern boundary of the critical habitat unit to correspond with the 2005 snowy plover management area.

17. *Comment:* One commenter suggested adjusting the southern boundary of the Dunes Overlook/Tahkenitch Creek Spit (OR–8B) critical habitat unit to match the off-highway vehicle closure boundary.

*Our Response:* We agree with the commenter and have made this adjustment.

18. *Comment:* One commenter recommended that Tenmile Creek Spit (OR–8D) be reduced in size to no more than 100 feet north and 100 feet south of Tenmile Creek to maintain the current population and no more than 100 yards north and south to accommodate recovery.

*Our Response:* We did not modify the critical habitat designation. Reducing the size of this critical habitat unit would reduce protections afforded by the designation to highly mobile chicks during the rearing period, and to nesting and wintering adults.

19. *Comment:* Two commenters suggested the southern boundary of Coos Bay North Spit (OR–9) be moved from ⅓ to ½ mile north of the jetty because western snowy plovers do not nest on the beach in that area. Another commenter recommended that we move the northern boundary of OR–9 about ¼ mile south of the New Carrissa because western snowy plovers do not nest on the beach in that area.

*Our Response:* We did not make the requested adjustment. Reducing the size of this critical habitat unit would reduce protections afforded by the designation to highly mobile chicks during the rearing period, and to nesting and wintering adults.

20. *Comment:* Two commenters wanted to exclude the sand road behind the foredune in OR–9 as this is used for recreation and access by Corps of Engineers.

*Our Response:* The foredune road at Coos Bay North Spit (OR–9) currently bisects a large habitat restoration (HRA) area that is managed and maintained as a breeding area. The management of the site includes closing the foredune road from 15 March to 15 September each year to reduce human disturbance and to facilitate brood movement from the HRA to the beach. Two alternate routes are available to access the north jetty, both of which avoid the HRA. These alternate routes are suitable to accommodate routine use. Consequently, we did not modify the designation in response to the commenters' suggestion.

21. *Comment:* Three commenters suggested moving the southern boundary of Bandon to Floras Lake unit (OR–10A) about 0.6 miles north since the area immediately west of Floras Lake is managed cooperatively with Curry County. Another commenter wanted to reduce the size of OR–10A to just those sites actually used by breeding snowy plovers with no more than a 100-yard buffer to the north and south of those sites.

*Our Response:* We did not make the requested adjustments. Reducing the size of the critical habitat unit reduces protections afforded by the designation to highly mobile chicks during the rearing period, and to nesting and wintering adults as the Pacific Coast WSP expands with recovery.

22. *Comment:* Many commenters (including a number of form letters) suggested removing the proposed Lake Earl unit (CA 1) from the final designation, while other commenters suggested eliminating the northern part, or the entire unit due to economic reasons, its narrowness, steep slope, and unsuitability resulting from dense European beachgrass. Commenters also questioned the value of designating critical habitat at the Lake Earl lagoon, stating that the Service has failed to show that nesting ever occurred at the unit's location.

*Our Response:* We agree with those commenters that provided information regarding the unsuitability of the narrow, northern portion of the proposed Lake Earl unit. The boundaries of the Lake Earl unit have been adjusted to remove the narrow, unsuitable portion to the north. The unit has been expanded to the State Park boundary to the south, resulting in an overall reduction in the unit's size. However, we believe that the remainder of the unit is important geographically to other essential habitat areas for the conservation of the Pacific Coast WSP. Lake Earl was designated as critical habitat because of its importance as a wintering area and its potential to support significant breeding populations. Plovers have been observed in the Lake Earl lagoon system during the breeding season in 1991 (PRBO, unpublished data) and nesting at Lake Talawa in 1997 (Page *et al.* 1981). We believe the economic impact presented by commenters is overstated because the current importance of the unit to plovers is based primarily on its utility as wintering habitat. Impacts to OHV and other recreational uses are minimal because much of the revised unit is difficult to access in winter due to the open breach of the Lake Earl lagoon.

23. *Comment:* One commenter states that the Arcata Fish and Wildlife Office has failed to meet with the representatives and citizens of Del Norte County to discuss how critical habitat designation may restrict recreational use, reduce land values, and effect the breaching of lakes.

*Our Response:* Staff from the Arcata Fish and Wildlife Office provided a presentation on the proposed critical habitat and answered questions at a Del Norte County Board of Supervisors (Board) meeting on March 8, 2005. The Arcata office held an additional public meeting in the Board's chambers on June 9, 2005, to discuss issues with the public regarding critical habitat designation. At both meetings, staff stated that restrictions applied to recreation and other uses within suitable plover habitat are dependant on the managing entity's actions, and are usually implemented in an effort to avoid take of a listed species rather than as a result of critical habitat designation. Service staff also stated that they are not qualified to make economic determinations regarding land values, and advised the Board and meeting participants to review the economic analysis when it became available. Service staff also discussed their January 05, 2005 biological/conference opinion for the 10-year Permit to breach the Lake Earl sandbar. In that biological opinion, no restrictions were imposed as a result of the proposal to designate critical habitat at the breach site (Section 7 consultation 8–14–05–2577).

24. *Comment:* A few commenters believed that the Clam Beach/Little River subunit should not be designated as critical habitat because of impacts to recreational uses and the resultant impacts to the local economy. One commenter mentioned that he had in his possession an informal survey support the impacts attributed to plover management activities.

*Our Response:* The draft Economic Analysis does not attribute a significant fiscal impact to designating critical habitat at the Clam Beach/Little River subunit (CA 3A). Additionally, the Humboldt County Public Works Department has stated that visitation is increasing at Clam Beach County Park (within subunit CA 3A), further indicating that visitor use is not significantly affected by plover management or potential critical habitat designation.

25. *Comment:* Many people (including signers of several petitions and form letters) commented on the proposed Dillon Beach (CA 7) unit. Overall, six supported designation of the unit; 14 did not state their position but requested information or public hearings, or suggested foci for the economic assessment; and the rest were opposed to the designation. Of those opposed, all but three indicated concern over loss of access to the beach. Other concerns raised included potential negative impacts to small businesses and local property values due to loss of beach access (94 commenters); and a perception that the proposed unit is not important to WSP conservation since snowy plovers do not nest there (458 commenters). People also disputed the conservation importance of the site, claiming that some other site would be better (39 commenters), and that the plovers are doing well enough at Dillon Beach to make critical habitat designation unnecessary (39 commenters). Four commenters pointed out that the identification of humans and pets as potential threats in the unit description implies an intent to restrict access by humans and pets. One hundred eight commenters requested a public workshop or hearing. Additional points raised included a concern that designation would influence state or local agencies to restrict recreational activities or land-use permits in the area. One commenter also argued that since plovers from outside the listed coastal population over winter on California beaches, there is no way to know whether those at Dillon Beach are from the listed or unlisted population.

*Our Response:* This unit was excluded from critical habitat designation under section 4(b)(2) of the Act, primarily based upon the landowner's willingness to enter a partnership ensure conservation (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). We identified the Dillon Beach site as essential to the conservation of the species because it has the essential habitat features, and because surveys have found higher populations of wintering plovers there than any other coastal site north of San Francisco (Page *in litt.* 2003). Adult over wintering survival is essential to the recovery of the population (Nur et al 1999). The surveys have also consistently noted numerous plovers banded as chicks at other coastal beaches, indicating that all or a substantial portion of plovers at the site are from the listed population (Watkins, *in litt.* 2005). In response to the requests for a public workshop or hearing, we hosted a well-attended public workshop in the area on February 14th, 2005, where these points were explained.

26. *Comment:* Several people commented on the units proposed for Sonoma, Marin and San Francisco Counties. One comment was on behalf of the Pt. Reyes National Seashore in support of the designation. Another was written at the public workshop held for Dillon Beach, and was generally supportive. A third letter provided information regarding pets at Limantour Spit (CA 9) but was otherwise neutral. The final two letters were neutral but encouraged us to include additional areas; specifically Ocean Beach, San Francisco County, and Salmon Creek and Doran Spit, Sonoma County.

*Our Response:* We appreciate the information and support provided, and support the habitat restoration measures outlined by the Pt. Reyes National Seashore. We have decided not to include the suggested additional areas because they do not meet our three criteria from the Methods section: They do not support either sizeable nesting populations or wintering populations, nor do they provide unique habitat or facilitate genetic exchange between otherwise widely separated units. Although we do not consider these areas essential for recovery, we do consider them important, and will continue to review projects in these areas that might affect WSP as required by sections 7 and 10 of the Act.

27. *Comment:* One commenter requested the Service exclude, under section 4(b)(2) of the Act, certain lands within the Oceano Dunes State Vehicular Recreation Area (ODSVRA), from the designation of critical habitat for the western snowy plover for economic and other reasons. The commenter suggested that because no direct public access exists from the south, the structure of the park requires vehicles to drive along the shoreline, through areas proposed for critical habitat, to access areas of the dunes used by off-road vehicles.

*Our Response:* In the final rule, we have removed the heavily disturbed open riding area of the ODSVRA from the entrance of the park and extending to the southern exclosure. The remainder of this unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

28. *Comment:* The same commenter stated that economic costs of inclusion (at ODSVRA) are great.

*Our Response:* This unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

29. *Comment:* The same commenter pointed out that conservation measures have been implemented at ODSVRA that have resulted in an increase in the number of nesting western snowy plovers, as well as an increase in their fledge rate, at this site.

*Our Response:* We agree with the commenter that conservation measures implemented at ODSVRA have been very effective, resulting in increased numbers of nesting western snowy plovers. Consequently, during the 2004 nesting season, ODSVRA supported approximately 4.6 percent of the coastal population of western snowy plovers. Of the 147 nests located at this site in 2004, 95 percent were found within the areas managed for western snowy plovers (State Parks 2004).

30. *Comment:* The same commenter stated that State Parks is currently preparing a Habitat Conservation Plan (HCP) for the San Luis Obispo Coast District including the ODSVRA.

*Our Response:* We are aware that State Parks is preparing a draft HCP for this area. It is not our policy to exclude areas from critical habitat based upon management plans which have not yet been made available for our review. However, this unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

31. *Comment:* Two commenters requested exclusion of three parcels (identified as the McDonald site (16.2 acres), the Sterling site (approximately 7 acres), and the Lonestar site (39 acres)) along the coastline of Sand City from critical habitat for the western snowy plover, stating that a 1996 Memorandum of Understanding (1996 MOU) between the California Department of Parks and Recreation, Monterey Peninsula Regional Parks District, City of Sand City, and Sand City Redevelopment Agency established a plan that ''* * * would actively manage (western snowy plover)/human interaction, thus maximizing the likelihood of (western snowy plover) recovery * * *.''

*Our Response:* We have reviewed the 1996 MOU. At no point does it mention

western snowy plovers or their management. It does state that the signatories ''desire'' to ''(s)upport efforts to restore sand dunes and associated dune vegetation and habitat'' and ''(c)reate and preserve a north/south habitat corridor for endangered and threatened species''. However, the 1996 MOU does not outline any specific actions to meet the habitat needs of western snowy. However, this unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

32. *Comment:* Two commenters requested exclusion of three parcels (as described above) along the coastline of Sand City from critical habitat for the western snowy plover, stating that a habitat conservation plan (HCP) being developed for the area is likely to assist in the recovery of the species and that designation of critical habitat within the subject parcels could disrupt the HCP planning process.

*Our Response:* We are available to assist non-federal landowners in development of HCPs that address listed species, including the western snowy plover. However, the ongoing development of a draft habitat conservation plan does not assure that the plan will be adequate or implemented. This unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

33. *Comment:* A commenter requested exclusion of three parcels (as described above) along the coastline of Sand City from critical habitat for the western snowy plover, stating that there would be little benefit to designating critical habitat within the subject parcels (largely because the commenter believes that there would be no consultation under section 7 of the Act for activities within those parcels).

*Our Response:* This unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activities will not destroy or adversely modify designated critical habitat. We believe that the commenter's conclusion that activities within the subject parcels would not require section 7 consultation(s) is premature. At a minimum, the Service would be required to conduct an internal section 7 consultation before any incidental take permit could be issued through the HCP process. Any other action authorized, funded, or carried out by a Federal agency that may affect a listed species would also require section 7 consultation.

34. *Comment:* A commenter requested exclusion of three parcels along the coastline of Sand City (as described above) from critical habitat for the western snowy plover, stating that designation of critical habitat within the subject parcels would have adverse economic effects on the City of Sand City by preventing future development activities within the subject parcels.

*Our Response:* This unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

35. *Comment:* A commenter requested exclusion of three parcels (as described above) along the coastline of Sand City from critical habitat for the western snowy plover, stating that because the subject parcels account for only approximately 20 percent of the Sand City coastline and represent marginal habitat, that their development would not impede recovery of the species.

*Our Response:* The majority of documented western snowy plover nests along the Sand City coastline have occurred within the three subject parcels (Noda *in litt.* 2003). In addition to breeding habitat, Sand City beaches have provided habitat for wintering western snowy plovers (Noda *in litt.* 2003). However, this unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

36. *Comment:* One commenter requested the Service minimize the areas of the Nipomo Dunes and Morro Bay designated as critical habitat for the ''coastal plover''.

*Our Response:* This unit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

37. *Comment:* One commenter suggested that two beaches in Santa Barbara County (East Beach and the breakwater Sand Spit in Santa Barbara Harbor) should be included in the final rule. The commenter also stated that these two sites were included in the 1999 final rule, but were excluded in our proposed rule without explanation. The exclusion of these two beaches without proper documentation and analysis is unsupported.

*Our Response:* Our current designation of critical habitat is different from the 1999 rule in two primary ways. In this designation, we utilized a different methodology for determining essential areas, and we relied upon additional scientific information which was not available in 1999. Thus, this rule, while similar in many respects to that in 1999, is a new designation, and does not designate the same areas.

38. *Comment:* Several commenters noted a discrepancy between the description of subunit CA 19A and the map for this subunit. The subunit is described as extending 6.1 mi (9.8 km) along the coast from the north jetty of the Channel Islands harbor. However the map of this subunit (Map 54) depicts it as starting about 1 mile north of the jetty. The commenters noted that the area immediately north of the jetty is known as Hollywood Beach and is an ''active critical habitat area of the western snowy plover.''

*Our Response:* Although the description of subunit CA 19A in the proposed rule included the Hollywood Beach area, an error was made during the preparation of the maps and Hollywood Beach was inadvertently not shown. We have now corrected that error, and Hollywood Beach is included in this final designation for the plover.

39. *Comment:* A commenter pointed out that, although the 2004 proposed rule states that all 61 ac proposed for designation at unit CA 13 (Pt. Sur Beach) are privately owned, a portion of the 61 ac is actually state lands. If the intent of the critical habitat designation is only to include private lands, then the commenter objects because the habitat features essential for the conservation of the plover are equally present in both the public and private portions of the unit and both public and private lands should be included.

*Our Response:* A table in the proposed rule (69 FR 75608) erroneously listed unit CA 13 as being private land. In actuality, unit CA 13 is entirely made up of State-owned land as stated in the text description for the unit.

40. *Comment:* A commenter stated that one of the functions of the jetty at the south end of subunit CA 19A is to act as a sand trap. Every 2 years they are required to dredge sand from this location and transport it farther south along to coast where there is erosion occurring. The commenter further noted that the biannual dredging has been ongoing for 40 years, and that the discontinuation of dredging could result in the creation of extremely hazardous conditions to vessels in the area. The commenter urged the Service to remove this sand trap area from the designation.

*Our Response:* Hollywood Beach, the area north of the jetty to which the commenter is referring is both a nesting and a wintering area for snowy plovers and has been determined to contain features essential to the conservation of the species. Therefore, we have included it in this final designation. We also point out that the designation of critical habitat does not prevent the sand dredging from occurring. If the action is permitted or authorized by a Federal agency, the Service would likely be involved with or without the critical habitat designation through a section 7 consultation with the Federal agency. We will continue to work with dredging operators to ensure endangered species conservation is made compatible with the safety of all vessels.

41. *Comment:* A commenter requested that two areas within or near the city of Morro Bay not be included in the designation. The commenter characterized the area south of Highway 41/Atascadero Road to Morro Bay Rock in subunit CA 15B as being heavily used for recreation and including parking lots, restrooms, lifeguard towers. The commenter also stated that we were in error when we said that subunit 15B is near the city of Morro Bay and is managed entirely by the California Department of Parks and Recreation. The area south of Atascadero Road is within the city limits and is owned and managed by the city. Similarly, the commenter stated we were in error when we said that the area south of Atascadero Road is an important breeding area supporting up to 40 nests each year when in fact there has never been any documentation of nesting or breeding in this area.

The second area the commenter requested not be included in subunit CA 15B extends north from Azure Street to the north end of the subunit. The commenter characterizes this area as being heavily populated with hundreds of homes and a State campground with thousands of visitors per year. The commenter further noted that few nests have been observed in this area and only in some years does nesting occur at all in the area.

*Our Response:* When we stated in the proposed rule (69 FR 75608) that subunit 15B was an important breeding area supporting up to 40 nests each year, we were discussing the entire subunit, not just the area south of Atascadero Road. However, as no nests have been documented for the area south of Atascadero Road and this area is highly disturbed, we have removed it from the designation as not being essential to the conservation of the plover. The remainder of this subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

42. *Comment:* A commenter requested that Hueneme Beach Park in subunit CA 19B not be included in the designation. The commenter characterized the park as a highly disturbed and heavily used recreational resource that is not appropriate for critical habitat. The park includes a fishing pier, picnic tables, barbeques, restaurant, parking lots, dog walk, and volleyball courts, and is also the location of biennial sand replenishment activities.

*Our Response:* Based on the information provided by the commenter and because there are no nesting plovers in the area, we have removed Hueneme Beach Park from subunit CA 19B because it is highly disturbed and not essential to the conservation of the western snowy plover. However, the remainder of subunit CA 19B has been designated as critical habitat.

43. *Comment:* A commenter requested that the Santa Barbara Harbor from Pt. Castillo to Salinas Creek and including the sand spit at the end of the breakwater be included in the critical habitat designation as it was in 1999.

*Our Response:* Although the area to which the commenter is referring was included in the 1999 designation (64 FR 68508) as CA–14 unit 2—Point Castillo/Santa Barbara Harbor Beach, we used a different methodology and set of criteria to determine critical habitat in the 2004 proposal (69 FR 75608). The Point Castillo/Santa Barbara Harbor Beach area was not included in the 2004 proposal because it did not meet the criteria for critical habitat established for the designation.

44. *Comment:* A commenter believes that the expansion of critical habitat in CA–18, Devereux Beach would be an ineffective form of conservation for the plover. As stated in the proposed designation (69 FR 75608), ''In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources.'' Furthermore, research conducted by Lafferty (2001) at Coal Oil Point indicates that expansion of the fenced area on the beach did not provide comparable gains in plover protection.

*Our Response:* This unit does not represent an expansion. This area was included in the original 1999 critical habitat designation for the plover (64 FR 68508) as CA–14, unit 1—Devereux Beach. In the original designation, the unit contained approximately 57 ac, while in the 2004 proposed rule, the unit is only 36 ac. The referenced fenced area is for the protection of nesting plovers. However, nesting plovers may forage over the entire beach and plovers also winter over the entire beach. Therefore, we have designated Devereux Beach as critical habitat for the plover, not just the area that is fenced to protect nesting plovers.

45. *Comment:* Another commenter noted that the California Coastal Commission has banned dogs from Devereux Beach (unit CA 18) where critical habitat has been designated and that the area designated at Devereux Beach should be reduced.

*Our Response:* Devereux Beach is both a plover breeding area and a wintering area, with as many as 360 wintering birds. Unit CA 18 also contains the physical and biological features essential to the conservation of the species. Therefore, we have designated 36 ac in this area as critical habitat for the plover, which is reduced from the approximately 57 ac designated in this area in 1999 (64 FR 68508).

46. *Comment:* Los Padres National Forest concurred with the decision of the Service not to include in the critical habitat designation location CA–69 (San Carpoforo Beach) from the draft recovery plan for the western snowy plover. San Carpoforo Beach is a very small beach that is occupied mainly by a few (about 35) wintering plovers.

*Our Response:* We concur. San Carpoforo Beach was not included in the critical habitat designation because it did not meet the criteria we set forth in this final designation.

47. *Comment:* One commenter applauded the Service for designating critical habitat for the plover in San Luis Obispo, Santa Barbara, and Ventura Counties, but also stated that all areas occupied by plovers should be designated.

*Our Response:* The Act states, at section 3(5)(C), that except in particular circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. We have designated habitat that contain sufficient features essential for the conservation of the species.

48. *Comment:* One commenter asked that Morro Bay's sandspit and beach [CA 15C] not be designated.

*Our Response:* This subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

49. *Comment:* One commenter believed that San Buenaventura Beach should be included as it was in the 1999 designation.

*Our Response:* Although the area to which the commenter is referring was included in the 1999 designation, we used a different methodology and set of criteria to determine critical habitat in the 2004 proposal (69 FR 75608). The San Buenaventura Beach area was not included because it did not meet the criteria for critical habitat established for the designation.

50. *Comment:* Two commenters stated that, since the criteria used to determine critical habitat for the western snowy plover are improper, those areas in San Luis Obispo, Santa Barbara, and Ventura Counties that were included in the 1999 designation but excluded in the 2004 proposal (Arroyo Hondo, Arroyo Laguna, Torro Creek, Jalama, Point Castillo/Santa Barbara Harbor, Carpinteria Beach, and San Buenaventura) should be included as critical habitat. These beaches should be included in the final designation as they are utilized by the species for wintering, they contain the identified primary constituent elements that may require special management, and the sites are essential to the survival and recovery of the plover.

*Our Response:* Although the areas to which the commenters are referring were included in the 1999 designation, we used a different methodology and set of criteria to determine critical habitat in the 2004 proposal (69 FR 75608). These areas were not included in the 2004 proposal because they did not meet the criteria for critical habitat established for the designation.

51. *Comment:* A commenter stated that the Guadalupe/Nipomo Dunes National Wildlife Refuge should be included in the final designation and that the Service's exclusion of this area because it is subject to a ''plover management plan'' that has undergone section 7 review was improper. No information was provided on the management plan to determine whether or not the plan provides a conservation benefit or otherwise meets the Service's criteria for adequate plans. In addition, the fact that the plan has undergone section 7 consultation does not demonstrate that the plan provides any benefits for the plover. The Service also failed to adequately balance the benefits of inclusion vs. the benefits of inclusion for the area when it was excluded.

*Our Response:* We have now included more detailed information on the Guadalupe/Nipomo Dunes National Wildlife Refuge plover management plan in this final rule. The refuges meet our criteria for management plans. See the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion of our exclusion of this refuge.

52. *Comment:* One commenter noted two areas in Orange County that were not proposed for critical habitat but are used by wintering plovers and constitute high quality habitat. One area is Surfside Beach in northern Orange County and the other is Newport Beach between Balboa Pier and the entrance to Newport Bay.

*Our Response:* Snowy Plovers were not discovered using these sites until the fall of 2004. We recognize that both locations support high quality habitat with large concentrations of snowy plovers, and have the potential to support breeding birds. However, the Service did not determine these areas to be essential to the conservation of the DPS and they were not designated as critical habitat. We are working with local jurisdictions and managers to reduce the threats to snowy plovers at these sites.

53. *Comment:* Two commenters stated that the Subunit CA 21D, Hermosa State Beach, is located in a heavily populated urban environment and should not be considered critical habitat. They also expressed concern over future restrictions on beach use.

*Our Response:* Hermosa Beach annually supports a relatively large wintering flock of snowy plovers (69 FR 75627). This flock persists despite the heavy recreational use of the beach area. Nearly all beaches in southern California are subject to heavy recreational use. To restrict snowy plovers to beaches without heavy recreational use would limit the plovers to few if any beaches in southern California.

54. *Comment:* Some commenters questioned the value of designating critical habitat at the Lake Earl lagoon (CA 1), and state that the Service failed to show that nesting ever occurred at the unit's location.

*Our Response:* Plovers were observed during the breeding season west of the Lake Earl lagoon during a breeding season window survey in 1991 (PRBO unpublished data). No plovers were observed during the subsequent survey in 1995 (an incomplete survey year, PRBO unpublished data). Page, et al., 1981, states that nesting plovers were found on the beach at Lake Talawa (*i.e.* western most portion of the Lake Earl lagoon system) during May, 1997. Yocom and Harris suspected breeding at the same location in 1975, but were unable to confirm it. Plovers currently overwinter within the designated CA 1 unit.

55. *Comment:* One commenter states that the Arcata Fish and Wildlife Office has failed to meet with the County of Del Norte and private citizens to comment on restricted recreational use, loss in land values, and effects on the ''Federal project'' of breaching lakes.

*Our Response:* Staff from the Arcata Fish and Wildlife Office provided a presentation on the proposed critical habitat and answered questions at a Del Norte County Board of Supervisors (Board) meeting on March 8, 2005, at the Board's request. The Arcata office held an additional public meeting in the Board's chambers on June 9, 2005, to discuss issues with the public regarding critical habitat designation. At both meetings, staff stated that restrictions applied to recreation and other uses within suitable plover habitat are dependant on the managing entity's actions, and are usually implemented in an effort to avoid take of a listed species rather than as a result of critical habitat designation. Staff also stated that they are not qualified to make economic determinations regarding land values, and further stated that is why the Service contracts out the economic analysis for designation. With regards to the ''Federal Project'' of breaching the Lake Earl lagoon system, Service staff referenced the recently completed biological/conference opinion (January 05, 2005) for the 10-year Permit to breach the Lake Earl sandbar. No mitigation, protective measures, or restrictions on the proposed action, or any activity, were imposed as a result of the proposal to designate critical habitat at the breach site (Section 7 consultation 8–14–05–2577). If not for the Federal action (*i.e.* mechanical breaching), the lagoon would breach on its own at a higher water level.

56. *Comment:* One commenter stated that the Service's assertion that human activity is the primary threat to plovers is erroneous as animal predators are more responsible for plover kills. The commenter opines that the Service should focus its efforts on predator controls over global land use and development restrictions. Another commenter states that human activity lowers the adverse effects of predators, and increases the plover's success.

*Our Response:* We agree with the commenter that predators are likely responsible for more direct kills and injuries; however, humans have contributed to the impacts of predators. Nest and chick predators have been introduced into areas where they are not native, and impact the reproductive success and survival of plovers (*e.g.* red fox). When humans and their pet flush nesting plovers on sandy beaches, the plovers leave tracks in the sand as they move off and on to the nest. Corvids use the plover tracks to locate nests, increasing the opportunities for successful nest predation. Human development and trash in and adjacent to suitable plover habitat has increased the incidence of some plover predators (ravens and crows). Additionally, human activities, such as development and beach raking, have rendered some beach sections totally unusable to breeding plovers, reducing the number of areas suitable for nesting. The areas with the highest predation rates usually do have some predator management associated with them. Nest exclosures, predator-proof trash receptacles, aversions conditioning, and both lethal and non-lethal control of predators has been successful in reducing the impacts of predators on plover reproduction and survival. We believe that these actions implemented to reduce the impact of predators on plover nesting, and other management measures designed to reduce the potential impacts of humans (e.g. use of symbolic fencing, public education, and enforcement of regulations), are responsible for the increases in plover breeding success documented at many locations.

*Comments Related to Military Lands*

57. *Comment:* A commenter stated Vandenberg Air Force Base should not be excluded unless there is a final integrated natural resources management plan.

*Our Response:* All lands essential to the conservation of the western snowy plover at Vandenberg have been excluded under section 4(b)(2) of the Act from the final designation of critical habitat because of alternative protective measures provided by the Air Force and because of the national security issues the Air Force stated in their February 7, 2005, comment letter (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion).

58. *Comment:* The Air Force submitted several comments relating to the exclusion of Vandenberg Air Force Base (Vandenberg) from critical habitat. They state that: (1) The Air Force has worked with the Service to revise the INRMP (which is expected to be completed in 2005), and that the INRMP contains special management activities that adequately address the conservation of suitable habitat important to long-term protection and recovery of the western snowy plover; (2) the western snowy plover and its habitat are already being protected at Vandenberg by the Air Force's Beach Management Plan; (3) all the proposed critical habitat areas on Vandenberg are occupied throughout the year and subject to consultation pursuant to section 7 of the Act; (4) the INRMP and Beach Management Plan together provide a greater level of protection for the western snowy plover and its habitat than a designation of critical habitat would provide; and (5) that the designation of critical habitat at Vandenberg would interfere with its mission execution and military training critical to national security.

*Our Response:* All lands essential to the conservation of the western snowy plover at Vandenberg have been excluded under section 4(b)(2) of the Act from the final designation of critical habitat because of alternative protective measures provided by the Air Force and because of the national security issues the Air Force discussed in their February 7, 2005, comment letter (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion).

59. *Comment:* The Navy commented that Naval Base Ventura County has a finalized INRMP that contains management actions that benefit the western snowy plover and its habitat. Naval Base Ventura County also has a biological opinion from the Service (issued on June 6, 2001) for all routine operations, a major part of which covers the western snowy plover. The INRMP incorporates all management actions being carried out by Naval Base Ventura County in response to the biological opinion.

*Our Response:* We have reviewed Naval Base Ventura County's INRMP and biological opinion. The Secretary determined, in writing, that Naval Base Ventura County's INRMP provides a benefit to the western snowy plover and therefore, consistent with Public Law 108–136 (Nov. 2003): Nat. Defense Authorization Act for FY04 and Section 4(a)(3) of the Act, the Department of Defense's Naval Base Ventura County is exempt from critical habitat based on the adequacy of their legally operative INRMP (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion).

60. *Comment:* The U.S. Navy requested that their facilities around San Diego Bay that were included in the proposed critical habitat, including NAS North Island, NAB Coronado, Naval Radio Receiving Facility, and NOLF Imperial Beach, be excluded from the final critical habitat as they are covered by an INRMP that provides a benefit to the species.

*Our Response:* The Secretary has determined the San Diego Bay Navy INRMP provides a benefit for the western snowy plover; accordingly, the Navy's San Diego Bay facilities are exempt from critical habitat designation pursuant to section 4(a)(3) of the Act, based on the adequacy of their legally operative INRMP (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion).

61. *Comment:* Marine Corps Base, Camp Pendleton commented that snowy plover habitat on the base receives substantial benefit from management actions directed through their Integrated Natural Resource Management Plan (INRMP). Therefore, all lands on Camp Pendleton should be excluded from the Final Rule, per Section 4(a)(3) of the Act, as amended by the 2004 Defense Authorization Act.

*Our Response:* Camp Pendleton actively manages snowy plover nesting and wintering habitat and this management has contributed to an increasing snowy plover population on the base over the past several years. The INRMP reinforces management actions stipulated under previous Section 7 consultations with the Service. The Secretary has determined the San Diego Bay Navy INRMP provides a benefit for the western snowy plover; accordingly, the Navy's San Diego Bay facilities are exempt from critical habitat designation pursuant to section 4(a)(3) of the Act, based on the adequacy of their legally operative INRMP (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section below for a detailed discussion). However, we note that not all lands within Camp Pendleton are

covered by the INRMP subject to Marine Corps management. Unit CA 24 is located at the far north end of the base on land leased to the California Department of Parks and Recreation, and is therefore actively managed by State Parks and not by the Base. The San Onofre State Beach within unit CA 24 is a recreational beach utilized by thousands of people throughout the year. Despite this heavy use, the beach is annually used by a substantial wintering flock of snowy plovers (69 FR 75628). As described in the proposed rule, this flock and the habitat that it utilizes are subject to disturbance due to the heavy recreational use of the area, which also likely precludes the use of the beach for breeding. With special management, the habitat in the proposed unit has a high potential to be managed and restored to a point where it is used by plovers for both breeding and wintering. Accordingly, we consider this beach to meet the definition of critical habitat and it is included in this designation.

62. *Comment:* Camp Pendleton also commented that the proposed critical habitat potentially impacts their military mission due to constraints on lands that have value for military training and operations. They particularly objected to the designation of critical habitat on Green Beach, an amphibious landing and training beach.

*Our Response:* We have refined our mapping for Unit CA 24 to more accurately define the essential snowy plover habitat between San Onofre Creek and San Mateo Creek. The majority of snowy plover use in this area currently is located in a less visited portion of the beach closer to the mid-point between the two creek mouths. The result of this refined mapping is a reduction in the length of the proposed unit at both ends, removing critical habitat from Green Beach as well as beach areas to the north of San Mateo Creek mouth.

*Comments Related to HCPs, NCCP Program, and Section 7*

63. *Comment:* Several commenters stated that the Pacific Coast WSP already had adequate protections under Section 7 of the Act, and therefore did not need to provide additional protection afforded by designating critical habitat.

*Our Response:* A critical habitat designation means that Federal agencies are required to consult with the Service on the impacts of actions they undertake, fund, or permit on designated critical habitat. While in many cases, these requirements may not provide substantial additional protection for most species, they do direct the Service to consider specifically whether a proposed action will affect the functionality of essential habitat to serve its intended conservation role for a species rather than to focus exclusively on whether the action is likely to jeopardize the species' continued existence. We agree, however, that even absent a critical habitat designation, Federal agencies are still required to consult on the impacts of their activities on listed species and their habitat.

*Comments Related to Economic Impacts and Analysis; Other Relevant Impacts*

64. *Comment:* Several commenters stated that the DEA inappropriately ignores benefits although it is possible to quantify the economic benefits associated with species protection. One commenter offers, for example, that contingent valuation studies have demonstrated existence value of non-human species. Another commenter states that the DEA should consider ''non-use'' welfare benefits, such as existence, option, stewardship, and bequest values, associated with protecting plover habitat.

*Our Response:* In the context of a critical habitat designation, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is to designate areas in need of special management that contain the features that are essential to the conservation of listed species.

The designation of critical habitat may result in two distinct categories of benefits to society: (1) Use; and (2) non-use benefits. Use benefits are simply the social benefits that accrue from the physical use of a resource. Visiting critical habitat to see endangered species in their natural habitat would be a primary example. Non-use benefits, in contrast, represent welfare gains from ''just knowing'' that a particular listed species' natural habitat is being specially managed for the survival and recovery of that species. Both use and non-use benefits may occur unaccompanied by any market transactions.

A primary reason for conducting this analysis is to provide information regarding the economic impacts associated with a proposed critical habitat designation. Section 4(b)(2) of the Act requires the Secretary to designate critical habitat based on the best scientific data available after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. Economic impacts can be both positive and negative and by definition, are observable through market transactions.

Where data are available, this analysis attempts to recognize and measure the net economic impact of the proposed designation. For example, if the fencing of a species' habitat to restrict motor vehicles results in an increase in the number of individuals visiting the site for wildlife viewing, then the analysis would recognize the potential for a positive economic impact and attempt to quantify the effect (*e.g.*, impacts that would be associated with an increase in tourism spending by wildlife viewers). In this particular instance, however, the economic analysis did not identify any credible estimates or measures of positive economic impacts that could offset some of the negative economic impacts analyzed earlier in this analysis.

Under Executive Order 12866, OMB directs Federal agencies to provide an assessment of both the social costs and benefits of proposed regulatory actions. OMB's Circular A–4 distinguishes two types of economic benefits: Direct benefits and ancillary benefits. Ancillary benefits are defined as favorable impacts of a rulemaking that are typically unrelated, or secondary, to the statutory purpose of the rulemaking. In the context of critical habitat, the primary purpose of the rulemaking (*i.e.*, the direct benefit) is the potential to enhance conservation of the species. The published economics literature has documented that social welfare benefits can result from the conservation and recovery of endangered and threatened species. In its guidance for implementing Executive Order 12866, OMB acknowledges that it may not be feasible to monetize, or even quantify, the benefits of environmental regulations due to either an absence of defensible, relevant studies or a lack of resources on the implementing agency's part to conduct new research. Rather than rely on economic measures, the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

We have accordingly considered, in evaluating the benefits of excluding versus including specific area, the biological benefits that may occur to a species from designation (see below, Exclusions Under section 4(b)(2) of the Act), but these biological benefits are not addressed in the economic analysis.

64a. *Comment:* Many commenters state that the DEA fails to distinguish costs specific to critical habitat designation from the costs of ESA listing and other co-extensive costs. One

comment states that critical habitat will not increase management as plover management is already in place.

*Our Response:* In conducting economic analyses, we are guided by the 10th Circuit Court of Appeal's ruling in the New Mexico Cattle Growers Association case (248 F.3d at 1285), which directed us to consider all impacts, ''regardless of whether those impacts are attributable co-extensively to other causes.'' As explained in the analysis, due to possible overlapping regulatory schemes and other reasons, there are also some elements of the analysis that may overstate some costs.

65. *Comment:* Another comment stated that the DEA should not include past costs as these costs are sunk costs that can not be recouped.

*Our Response:* As part of our economic analysis, we have estimated the past costs associated with the listing of the species prior to designating critical habitat. However, we have only used the prospective estimated costs for excluding certain units from this final critical habitat designation pursuant to section 4(b)(2) of the Act (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act below).

66. *Comment:* Several commenters state that the DEA should address ''other relevant impacts'' in addition to the economic impacts.

*Our Response:* The Service believes the words ''other relevant impacts'' refer to policy issues, such as, for example fostering conservation partnerships and relations with tribal governments. These policy considerations are inappropriate for review in an economic analysis. If the Service considers excluding areas for these reasons, it conducts a separate analysis under section 4(b)(2) of the Act to balance the benefits of excluding these areas with the benefits of including them.

67. *Comment:* One commenter states that the DEA should examine the costs of not designating critical habitat and the impacts of the plover being delisted. For example, it should consider impacts of legal challenges, relisting, and the need to fund management efforts for a species further from recovery than when originally listed.

*Our Response:* As part of our economic analysis, we estimate the costs associated with those economic activities believed to most likely threaten the plover and its habitat within the boundaries of the proposed designation. Due to cost and time constraints, it is not possible for us to estimate costs associated with different listing procedures.

68. *Comment:* One commenter states that, in the DEA, the area that will experience the greatest future economic impacts from plover conservation efforts is Unit CA–12C, including the area of Sand City. The cost in this area is disproportionate to the benefit of inclusion and the area should be excluded from the final designation. The comment further states that excluding Sand City from critical habitat will contribute to a more positive climate for voluntary habitat conservation efforts, which provide greater conservation benefits than critical habitat. This comment also asserts that it can not be argued that exclusion of the land area within Sand City would lead to the extinction of the plover or appreciably reduce its recovery.

*Our Response:* As part of this final rule, we have excluded Unit CA–12C from this final critical habitat designation pursuant to section 4(b)(2) of the Act. For further information see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act below.

69. *Comment:* One comment states that Morro Bay should be excluded from CHD as the DEA identifies it as one of the high cost areas while no plovers fledged there in 2004 and only one in 2003. The costs are therefore greater than the benefits for the community. The comment further states that the critical habitat designation is not working as there were more plovers on the beach in Morro Bay before the restrictions went into place.

*Our Response:* We have excluded the Morro Bay unit from this final critical habitat designation pursuant to section 4(b)(2) of the Act (see section titled below Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

70. *Comment:* One comment noted that the Service did not provide the minimum required 60-day comment period and that comments are due only days before the court-ordered final designation deadline of September 20, 2005.

*Our Response:* The Service provided a 60-day comment period on the proposed critical habitat designation. The need to meet the court ordered deadline of September 20, 2005 made it impossible for us to open the comment period on the economic analysis for 60 days as well.

71. *Comment:* A comment on the proposed designation requests that the Service correct the mapping errors in its December 17, 2004, proposed rule to protect Sand City and landowners should the proposed critical habitat boundaries become relevant.

*Our Response:* Our maps are used only as a general guide to assist landowners to determine the location of the boundaries of a proposed or final critical habitat designation. The legal coordinates presented at the end of this final rule represent the actual boundaries of this final critical habitat designation. As part of this rule making process, we have made every effort to ensure that our maps are as accurate as possible. The final rule, economic analysis, and supporting Geographic Information System (GIS) maps will also be available via the Internet at *http://www.fws.gov/pacific/sacramento/default.htm.*

72. *Comment:* One commenter requests that the Service clarify the exclusion of the Metropolitan's property at Ormond Beach by delineating it on the map in the final rule as this was not clear in the maps contained in the proposed rule.

*Our Response:* Our maps only depict those areas we have proposed or designated as critical habitat. We include some features on those maps so that the public can determine where the general boundaries of the proposed and final designation occur. Unfortunately, we can not have all features identified on these maps. In the case of areas excluded from the proposed and final designation, these areas would not be identified as critical habitat. Please be aware that the use of these maps is only intended to serve as a general guide for the public to determine the boundaries of critical habitat, and to determine the actual boundaries of this designation, a person should use the legal coordinates located at the end of this final rule.

73. *Comment:* One commenter suggests that it might be instructive to do a study on how many people choose not to go to a beach because it is being used by vehicles.

*Our Response:* In essence of costs and time, we have conducted our economic analysis to identify those economic activities believed to most likely threaten the plover and its habitat and, where possible, quantify the economic impact to avoid, mitigate, or compensate for such threats within the boundaries of the critical habitat designation. We found no evidence that beach use would increase if vehicle use was not permitted.

74. *Comment:* One comment states that the Arcata Fish and Wildlife Office has failed to meet with the County of Del Norte and private citizens to comment on restricted recreational use, loss in land values, and effects on the ''Federal project'' of breaching lakes.

*Our Response:* Staff from the Arcata Fish and Wildlife Office provided a presentation on the proposed critical habitat and answered questions at a Del Norte County Board of Supervisors (Board) meeting on March 8, 2005, at the Board's request. The Arcata office held an additional public meeting in the Board's chambers on June 9, 2005, to discuss issues with the public regarding critical habitat designation. At both meetings, staff stated that restrictions applied to recreation and other uses within suitable plover habitat are dependant on the managing entity's actions, and are usually implemented in an effort to avoid take of a listed species rather than as a result of critical habitat designation. Staff also stated that they are not qualified to make economic determinations regarding land values, and further stated that is why the Service contracts out the economic analysis for designation. With regards to the ''Federal Project'' of breaching the Lake Earl lagoon system, Service staff referenced the recently completed biological/conference opinion (January 5, 2005) for the 10-year Permit to breach the Lake Earl sandbar. No mitigation, protective measures, or restrictions on the proposed action, or any activity, were imposed as a result of the proposal to designate critical habitat at the breach site (Section 7 consultation 8–14–05–2577). If not for the Federal action (i.e. mechanical breaching), the lagoon would breach on its own at a higher water level.

75. *Comment:* One commenter states that the maps within the proposed rule are misleading as they do not make it clear that the majority of the designation is private property. The commenter states that 87 percent of the proposed designation is private property. The commenter also highlights that the map delineating Unit CA–1 is incorrect.

*Our Response:* As part of our proposed and final designation of critical habitat, we have done our best to present maps of those areas we have determined to be critical habitat. We have provided legal coordinates so that a landowner can determine where the proposed or final critical habitat designations exist, maps to serve as a general reference or guide of where those boundaries occur, and have provided a table indicating the quantity of the proposed and final designation that is in private ownership, or is owned by the State, Federal, or local governments. In total, approximately 3191 ac (1,296 ha) of this final designation is privately owned land. The final rule, economic analysis, and supporting Geographic Information System (GIS) maps will also be available via the Internet at *http://www.fws.gov/pacific/sacramento/default.htm.*

76. *Comment:* One comment states that the DEA frequently uses the term ''opportunity costs,'' but fails to mention the potential for ''substitution effects.''

*Our Response:* Section 4.3 and 4.4 (specifically, paragraphs 147, 152–153, 159, 171, 189, and 205, and Exhibit 4–32) of the DEA address substitution effects. In addition, the analysis acknowledges the availability of substitute sites could lower the per-trip loss. Accordingly, the DEA assumes beaches where less than ten percent of the linear extent of the beach is fenced have sufficient substitute possibilities for beach-goers such that quantification of small changes in consumer surplus is not feasible.

77. *Comment:* According to one commenter, an economic impact analysis should include the following elements: (1) Direct, indirect, and induced economic activities (output, employment and employee compensation); (2) changes in property values; (3) property takings; (4) recreational impacts; (5) business activity and potential economic growth; (6) commercial values; (7) County and State tax bases; (8) public works project impacts; (9) disproportionate economic burdens on society sections; (10) impacts to custom and culture; (11) impacts to other endangered species; (12) environmental impacts to other types of wildlife; and (13) any other relevant impacts.

*Our Response:* The DEA does not address property takings, impacts to custom and culture, impacts to other endangered species, and environmental impacts to other types of wildlife as these elements are outside of the scope of the analysis as described in Section 1. The remainder of these elements were explicitly considered and described in the DEA, and quantified where possible.

78. *Comment:* Multiple comments state the resources employed to administer plover protection (*i.e.*, labor, fencing, monitoring, etc.) injects spending into the local economy and this should be considered in the DEA. For example, one comment states that while the DEA only includes the economic costs associated with plover research and management activities, it should be noted that these activities also bring money into Humboldt County in the form of research grants and contracts that pay graduate students, consultants, and other researchers that live in the area. The comment highlights a recent Humboldt State University (HSU) Study that indicates that each HSU student not living at home contributes approximately $10,000 per year to the local economy, not including state fees. Three to four graduate students at HSU have studied the plover over the past five years. Another comment states the economic benefits and income from designation, habitat protection, monitoring, and management of snowy plover and other species utilizing the habitat, and recreational and educational opportunities should be included in the DEA.

*Our Response:* The DEA acknowledges that certain communities may experience increased economic activity as a result of plover management efforts. The expenditure of management resources to protect the plover, however, represents an opportunity cost as these resources are no longer available for other uses. The fact that management expenditures generate local employment and associated spending for consultants, students and researchers represents a distributional effect rather than a compensating surplus gain.

79. *Comment:* One commenter stated that while the forecast period of the DEA is only 20 years, the Service has a duty to imagine that our ancestors will be present for hundreds or thousands of years and the birds should be here along with them.

*Our Response:* Section 1.3 of the DEA discusses the analytic time frame. To be credible, the economic analysis must estimate economic impacts based on activities that are reasonably foreseeable. A 20 year time horizon is used, because many land managers do not have specific plans for projects beyond 20 years, and forecasting beyond this time increases the subjectivity of estimating potential economic impacts (i.e., any results would run the risk of being speculative). In addition, forecasts used in the analysis of future economic activity are based on current socioeconomic trends and the current level of technology, both of which are likely to change over the long term.

80. *Comment:* Multiple comments expressed concern that while the DEA acknowledges that no data exist on whether or to what extent plover habitats might affect the use of beaches, it still applies the assumption that fewer visitors will visit a beach during breeding season. For example, several commenters highlight that no evidence exists that recreation has declined at particular sites (e.g., Coal Oil Point Reserve) where critical habitat has been designated since 1999. Further, California Department of Parks and Recreation states that they have not found that plover fencing significantly reduces visitation or diminishes

recreational experiences, except for at the Oceano Dunes State Vehicular Recreation. The comment states that data indicate that from 1995 to 2004, visitation at many state beaches showed an upward trend in visitor attendance. For example, Salinas River State Beach is one of the most productive and heavily fenced parks units in CA–12C, with 99 nests reported in 2004 over the 3.5 miles of beach habitat. Attendance figures for this park unit have steadily increased since 1997 despite critical habitat designation in 1999 and an increase in number of fenced plover nesting areas.

*Our Response:* Section 4.3 of the DEA details the methodology applied to determine what, if any, impacts may occur due to plover fencing on beaches. While attendance at State beaches may have increased, it is not necessarily the case the plover fencing did not impact visitation. Data are not available, for example, to estimate whether visitation would have increased at an even greater rate in the absence of plover protections. Ideally, visitation rates at individual beaches would be compared before and after plover conservation efforts were undertaken. Such data were not available for use in the DEA. Therefore, absent empirical evidence of the change in visitation levels, the assumption that fewer recreators visit plover beaches than would have absent fencing is an appropriate means to bound the potential impact of conservation efforts. This approach was peer reviewed and determined to be reasonable.

81. *Comment:* Many comments disagree with that the assumption in the DEA that all the foregone acres of beach set aside for plover breeding could be used for recreation. In particular, commenters state that the assumption that recreation is completely eliminated from entire stretches of beach where symbolic fences or exclosures are erected overestimates impacts. They state that most access restrictions occur on the foredune, away from the wave slope (or wet sand) where most recreation (e.g., walking, riding, driving) occurs. In addition, for a number of the beaches, the fenced areas are not amenable to recreation for much of the plover breeding season. One commenter asserts that this is not considered in the DEA, which assumes year round usage of all acreage designated.

*Our Response:* Paragraphs 148–149 of the DEA present the anecdotal evidence provided in the literature and by interest groups and beach managers that beach visitors may or may not be affected by plover conservation efforts depending on, for example, their primary purpose of visitation and location of fencing. In fact, some visitors may consider their beach visit enhanced due to the possibility of plover viewing, while others may consider it degraded due to restricted access at particular stretches of beach. Because of the uncertainty surrounding the potential reactions of beach visitors to plover-related access restrictions, the DEA employs two alternative methods to estimate the potential magnitude as discussed in Section 4.3. The first method, scenario 1, used in the DEA assumes that as a result of plover restrictions, recreators take fewer trips to the beach. The availability of substitutes is considered. For beaches at which less than 10 percent of the beach length restricts recreation, this analysis assumes that recreators may visit substitute sites of the beach resulting in negligible welfare losses. The second method used in the DEA, scenario 2, assumes that rather than losing beach trips, recreators visit their first choice sites but have a diminished experience as a result of plover restrictions. This second approach may overstate losses at beaches that are sparsely visited and therefore are not likely to experience significant congestion as a result of fencing. This scenario, however, does not account for the losses to recreators who choose to visit a less-preferred beach or who make fewer trips.

82. *Comment:* Multiple commenters assert that the methodology used to estimate lost recreational opportunities in the DEA is flawed. One commenter noted that the assumption that all beach users get less enjoyment from short stretches of beach, specifically that pedestrians and equestrians lose $1.42 in daily net economic value for every one mile reduction in beach length, means that everyone gets less pleasure from visiting shorter beaches, such as College Cove, than longer beaches, such as Mad River.

*Our Response:* The DEA assumes that visitors hold the same value for each one mile stretch of beach at all beaches across the designation. Accordingly, if a stretch of beach is restricted, the value to the visitor of that stretch is lost. The DEA does not make inter-beach comparisons of value. That is, the lost value of a restricted area on a particular beach reduces the value of that same beach absent plover fencing. The total values of various beaches (for example, shorter to longer beaches) can not be compared using only the value per mile per person per day. Other variables factor into estimating the value the public places on a beach, for example, the availability of parking.

83. *Comment:* One commenter states that the claim in section 4.5.1 of the DEA that 70 percent of total annual beach attendance occurs during plover nesting season is incorrect. The commenter offers that a more likely estimate is 20 to 25 percent as nesting season occurs five to six weeks before school is over for the summer and that peak beach attendance is in July and August. Another commenter stated that reliance on vehicle-counters and vehicle counts in parking lots can overstate visitors.

*Our Response:* As described in the proposed rule, the DEA considers plover nesting season to be from early March to late September. Paragraph 158 describes that the estimate of 70 percent visitation during the nesting season is based on monthly visitation rates for beaches managed by California Department of Parks and Recreation with greater than ten plovers. In each instance, the DEA employs the most comprehensive data available in estimating number of visitors to the beach, in some cases visitor logs are kept by the beach managers, in other cases vehicle counts are considered the best indicator of visitation rates.

84. *Comment:* A comment highlights that the DEA states ''Where data are not available for a beach area considered in the analysis, the closest similar site was identified and its attendance rate is used to calculate expected visitation.'' The comment notes that this assumption is very problematic in California, where beach visitation varies significantly from beach to beach and it is inappropriate to assume that beaches near one another would have similar visitation.

*Our Response:* In the absence of specific visitation data for particular beaches, the analysis applies the visitation rates from the nearest beach with similar characteristics. The DEA acknowledges the limitations of this transfer and notes that better data are not currently available to improve upon these visitation estimates. The Service also notes that this type of data limitation only occurred in four subunits, only one of which experiences fencing.

85. *Comment:* One commenter offers that estimates of plover exclosure diameters of five to eight meters as assumed in the DEA far exceeds the actual size of the exclosures.

*Our Response:* As described in paragraph 165 of the DEA, the five to eight foot diameter design for exclosures assumed in the DEA is equal to that prescribed in the California Department of Parks and Recreation's Plover Systemwide Management Guidelines.

86. *Comment:* Other commenters question the DEA's assumption that the

value of a diminished beach trip is directly proportional to length of beach closed. The commenters note that the Lew and Larson study (Lew, Daniel K. and Douglas M. Larson, 2005, Valuing Recreation and Amenities at San Diego County Beaches, Coastal Management, 33:71–86) from which this information was obtained also offers the following information cited in the DEA ''the coefficient on the length variables indicate utility increases with the length of the beach at a decreasing rate. In fact, the Lew and Larson paper provides the coefficients, which show that while beach length is positive, beach length squared is negative, making apparent that there is a non-linear and diminishing effect of additional beach length. Thus, the last few linear yards or miles of beach have less effect on visitation and value than the first linear years or miles of beach.'' The commenters therefore state that the DEA should incorporate this information or estimate elasticity of demand for recreation at the beaches to account for this affect.

*Our Response:* Paragraph 196 of the DEA describes the method applied to estimate value per mile of beach. The DEA applies the mean beach length from the peer-reviewed California-based study (Lew and Larson, 2005) of 2.06 miles, and divides it by the implicit price estimated from the study's utility function. This results in a value of $1.42 per beach mile per visitor on average. While Lew and Larson do use a functional form (quadratic) that allows them to estimate a non-constant marginal impact of beach length, strictly applying this functional form to individual beaches creates complications. For example, the Lew and Larson results imply that for all beaches longer than 8.4 miles, additional length will decrease the value of a visit. Equivalently, the results imply that partial closures may lead to benefits for visitors at such beaches. In order to apply the results of this study to our sample of beaches, the DEA derives and applies a single average value from the Lew and Larson study. Further, plover fencing may occur anywhere along the beach (e.g., at the beginning, end, at multiple locations, or at access points) and therefore result in fragmented beach access; that is, access restrictions for plover conservation are not necessarily continuous. The DEA does not assume that there is a negative value to incremental reductions in beach length for sites longer than 8.4 miles but instead assumes visitors value incremental length on longer beaches as much as on shorter (below 8.4 miles) beaches. This method of applying the Lew and Larson study to estimate decreased value of beaches due to plover restrictions was determined by peer reviewers to be reasonable with the data available.

87. *Comment:* Several comments state that the assumption that visitors are distributed evenly along the entire length of the beach is false. Specifically, the California Department of Parks and Recreation comments that beach users at most non-motorized beaches areas tend to spend the majority of their time within a quarter of a mile from the access points or along the wet sand near the waters edge.

*Our Response:* Exhibit 4–32 the DEA acknowledges that, to the extent visitors congregate around access points, this analysis overstates the lost recreation value associated with plover conservation efforts. However, quantified estimates of the distribution of visitors away from access points are not available for California. In addition, the estimation of the specific visitor densities in the vicinity of the plover fencing or exclosures is complicated by the fact that the location plover fencing may change over time depending on the location of nest sites.

88. *Comment:* One comment on the DEA states that the $30 per person per day value of lost recreation applied in the DEA is drawn from a study of beach use in the San Diego area and may not apply to rural areas such as Humboldt County. Similarly, another comment states the use of Southern California value estimates for other regions that are vastly different in populace and land uses overstates recreation impacts in the other regions.

*Our Response:* Ideally, specific per person per day values for lost recreation would be applied for each individual beach in the analysis. During the development of the DEA, however, these data were not determined to be available for each beach in California, Oregon, and Washington. Available studies that estimate value of beaches for recreation are based on beaches in Santa Monica and Orange Counties, California and the east coast (e.g. Florida and New Jersey). Values reported in these other studies of beach recreation, range from approximately $12 to $62. The DEA estimate of $30 per person per day for a beach trip falls well within this range. Based on location, date, and study characteristics, the Lew and Larson (2005) value of general beach recreation on San Diego beaches was determined to be the most appropriate for the DEA. Peer reviewers of the DEA agreed that this value was reasonable considering available information.

89. *Comment:* Multiple comments on the DEA assert that the value of the birding, botonizing, and general nature-related enjoyment should be included. The comments provide numerous specific examples of essential habitat units where birders travel specifically to see plovers and where plover management results in a more aesthetically pleasing area. The Service's 2001 National Survey of Fishing, Hunting, and Wildlife Associated Recreation estimates 1.3 million individuals visited the California ocean side to engage in shorebird viewing accounting for over 22 million non-residential (i.e., away from home) bird observation days in California. This study highlights that in 2001, expenditures in California by all wildlife viewers amounted to an estimated $2.1 billion, and that shorebird viewing constitutes an important component of all wildlife viewing in California. Finally, a comment states that the preservation of open space for the plover draws local, regional, and international visitors that contribute to the local economy.

*Our Response:* The DEA acknowledges the potential for benefits to the birding community of plover conservation efforts and notes that, to the extent that birding, botanizing, and general nature-related enjoyment are increased by the plover conservation efforts, the DEA overstates the economic impact of these conservation efforts. Evidence exists that some percentage of visitors engage in birding activities. The Oregon Shores Recreational Use Study estimates that 0.2 percent of visitors to all beaches across the State identified birding as the primary reason for their trip. Data are not available, however, to estimate the number of visitors that may engage specifically in plover-viewing. Further, the National Survey described above evidences the importance of wildlife-viewing in the entire State, not that specifically related to plover habitat. The Survey also does not offer sufficient information to determine how many viewers visit the plover beaches, and further, how their decision to visit is related to the plover conservation efforts quantifies in the DEA.

90. *Comment:* One comment highlights the availability of literature valuing wildlife-viewing in California (Cooper and Loomis, 1991, ''The Economics and Management of Water and Drainage,'' Agriculture, Dinar and Zilberman, eds.). These data could be used to value the benefits that seeing additional plovers might provide to beach visitors.

*Our Response:* The study cited in the comment offers a metric to correlate bird populations with increased value for a birding trip. While the DEA acknowledges the potential for improved conditions for bird-watching, as mentioned above, data are lacking in the numbers of visitors to the plover beaches that participate in bird-viewing. In addition, data on the number of birds typically seen on a single trip at each site absent plover conservation activities, and the increase in plovers seen as a result of conservation activities, is unavailable. It is therefore not clear how these value estimates in the cited study may be applied to this analysis.

91. *Comment:* Another comment states that the DEA uses the average value per trip of $30 from the Lew and Larson (2005) article. However, page 4–21, footnote 118 of the DEA notes that when substitute beach opportunities are taken into account, the losses from completely closing a single beach is between $0 and $1 per person trip; for example, for Silver Strand State Beach the loss per trip is $0.09. As stated in the footnote, the losses estimated recognizing the availability of substitutes can lower the recreational losses by an order of magnitude. The comment further expresses that the Lew and Larson research could be used somehow to estimate the lost value from closing several beaches as an upper bound on partial closures of beaches due to critical habitat.

*Our Response:* As noted in the Lew and Larson study, the values referred to in the comment, $0 to $1, are per-trip economic values of closing individual beaches out of choice set of 31 beaches in San Diego County. The per-trip value is multiplied by all the individuals in the county who ever visit any beach, regardless of whether their first choice site is the beach that closes. This aggregate value represents the welfare loss of closing a single beach. Transferring this value to the DEA requires estimating the total number of people who visit any beaches (public and private) within California, Oregon, and Washington, and not simply the plover beaches addressed in the DEA. In other words, value losses would occur to all visitors for which a plover beach is within his or her choice set. Estimating the number of beach users cannot be accomplished simply by looking at beach visitation data, as single users may visit the beach multiple times. In addition, data are not available at the State level to group beaches into choice sets, and to understand the total number of visitors to each set. These issues present significant limitations to using these data to estimate impacts of plover restrictions. In addition, although the per trip value loss is less than the value used in the DEA, the number of beach users by which this value is multiplied is likely more than the number of visitors to plover beaches. Therefore, a method that applies the $0 to $1 values may not result in a significantly lower estimate of impact.

92. *Comment:* One party comments that the DEA assumption that the entire length of the critical habitat unit is closed where information on the amount of fencing is not available is not appropriate. The comment offers that the DEA should use instead estimate an average fencing length to total length of the critical habitat unit to make an informed estimate.

*Our Response:* In the absence of information regarding length of fencing, the DEA assumes the entire length of critical habitat publicly owned or managed is fenced in four units. Estimating an average ratio of fenced to total beach is complicated by the extreme variation in this value across beaches. The ratio varies from 0.01 percent to 100 percent across the proposed designation. In the case that the fenced area is smaller than the proposed habitat in these four units, impacts to recreation are likely overestimated. It is not clear, however, that the methodology suggested by the commenter would yield more accurate results than that employed in the DEA.

93. *Comment:* A commenter states that the seventy mile portion of the coast between Gaviota and Guadalupe has only four coastal access points; those at Surf Beach and Ocean Beach provide the nearest coastal access for the 65,000 residents of Lompoc Valley. The comment further states that both beaches have been affected by the beach closures due to the designation of critical habitat for the plover. For Lompoc Valley residents, coastal access alternatives are almost an hour drive.

*Our Response:* This comment provides anecdotal evidence supporting the assumption applied in the DEA that beach users may be impacted by plover conservation efforts and that limited substitutes may exist in particular areas.

94. *Comment:* A commenter states that the recreational impacts to CA–17A and CA–17B are underestimated in the DEA and that the total economic loss in beach use at these sites is $627,908 per season (2002$). The comment questions the DEA conclusion that five other stretches of the California coast experience greater economic losses despite the fact that they have other beach access alternatives. The commenter requests that the DEA consider both the number of users and the availability of alternative beach access locations.

*Our Response:* The data used to calculate the number of visitors impacted at these sites were provided by Santa Barbara County and Surf Ocean Beach Commission. Because data are available for the period after plover restrictions were put in place, based on the length of beach previously available, the analysis assumes visitation may have been four times higher without plover fencing. As described in Section 4.3, the DEA employs two distinct scenarios to estimated the potential magnitude of loss associated with reduced recreational opportunities. Scenario 1 assumes that as a result of plover restrictions, recreators take fewer trips to the beach and assigns a value obtained from the published economics literature to those lost beach trips. Under this scenario the DEA estimates an annualized loss of $5.14 million for subunits CA–17A and CA–17B. Scenario 2 assumes that rather than losing beach trips, recreators still visit their first choice sites but have a diminished experience as a result of plover-related access restrictions. According to this scenario, an annualized loss of $120,000 is forecast in subunits CA–17A and CA–17B. The estimate provided by Santa Barbara County falls within the range of potential impacts as estimated in the DEA.

95. *Comment:* One commenter stated that the DEA should not estimate losses to recreation on beaches at which access is restricted for national security reasons, such as Vandenburg Air Force Base, or on beaches for which the purpose of public acquisition is for habitat preservation, such as Coal Oil Point Reserve and Nipomo Dune National Wildlife Refuge.

*Our Response:* The DEA estimates losses to recreation at Vandenburg Air Force Base as stretches of beach that were previously open to the public were closed due to the presence of the plover and not for national security reasons (see Section 4). Similarly, stretches of beach that were open to the public at Coil Oil Point Reserve have been fenced for the plover. The economic analysis assumes that these access restrictions for the purpose of plover conservation may impact the visitors to these beaches and quantifies the impact. The DEA does not, however, estimate any impact to recreation at Nipomo Dune National Wildlife Refuge as access to this site restricts access to the public for reasons unrelated to the plover.

96. *Comment:* One comment expresses concern that the DEA applies an estimate of the value recreational vehicle use from a study based in Utah and North Carolina, while the plover habitat is within California, Oregon, and Washington.

*Our Response:* Ideally, the DEA would employ a California-based study to determine the value of beach vehicle recreation. However, no such study was identified during the development of the DEA. The estimates used were contemplated by peer reviewers on the DEA and determined to be the most reasonable given currently available information.

97. *Comment:* One comment states that the DEA does not take into account the fact that Oceano Dunes State Vehicular Recreation Area (ODSVRA) is the only beach in California that legally permits the general public to drive on the beach and camp with recreational vehicles (RVs) directly on the beach. The comment further states that the DEA does not account for the value visitors place on restrictions to the unique beach camping opportunities at ODSVRA. Given the high visitation rate, as well as the location of camping restrictions, plover conservation has substantially reduced the value of the camping experience by creating a congested camping environment.

*Our Response:* The DEA assumes that no substitute sites for this beach exist and accordingly estimates the value of restricted trips by assuming these visits are completely lost. Further, the DEA values pedestrian trips to this site at $30 per day and OHV trips to this site at $54 per day, consistent with the other sites in the analysis and relying on data provided by OSDVRA on the relative proportions of visitor types. The increment by which the opportunity for camping may increase the value that recreators hold for this site is unknown, and no additional information about this value was provided in public comment. If the value of a camping trip to this site is greater than $30 per day, the DEA may underestimate impacts to pedestrian users who camp at ODSVRA. Similarly, if the value of a camping trip at this unique site exceeds $54 per day, the DEA may understate impacts to OHV users who camp at ODSVRA.

98. *Comment:* One commenter states that visitors to ODSVRA tend not to be local residents and that applying the studies of expenditures of beach users for southern California, where many of the visitors are local, underestimates the impact to the regional economy. The comment further states that the DEA appears to underestimate attendance at ODSVRA. Page 4–45 of the DEA indicates beach attendance to be constant at 1,486,158 visitors (2002 data) through 2025. The DEA does not take into account increasing visitation. Also, the comment states that the DEA does not provide information on how the annual visits per mile (200,812) during the breeding season was calculated.

*Our Response:* Based on a study published by the State of California's Department of Parks and Recreation in 1993 and provided in public comment, ODSVRA users spend more per trip than assumed in the DEA. In response to this comment, the regional impact modeling tool, IMPLAN, employed in the DEA was re-run to determine impacts as a result of recreation restrictions at ODSVRA for San Luis Obispo County, California assuming each lost trip results in a decrease in local expenditures of $97, as opposed to the $51 originally assumed in the DEA. This value is applied to a reduction in 209,164 trips in an average year from 2005 to 2025 resulting in an estimated impact of $30.1 million. This loss represents 0.25 percent of the annual baseline economy of San Luis Obispo County. This loss in trips is also estimated to impact 597 jobs in the County, or 0.45 percent of the annual baseline jobs.

To estimate visitation, the DEA used attendance data provided for ODSVRA by California State Parks for years 1997 to 2004. The values presented on page 4–45 represent average annual attendance during the nesting season. Attendance in 2004 was estimated to be 1,763,948. Further, as described in paragraph 159, the annual visitor estimates are assumed to increase two percent annually and are not assumed to be constant across future years.

To estimate the average annual number of visitors per mile at ODSVRA, the DEA assumes that 6.4 miles of beach are available for recreation in Unit CA–16. The average annual visitation to the entire area is estimated to be 1.8 million and the DEA assumes that 70 percent of annual visitation occurs during the plover breeding season. The estimate of visitors per mile during the breeding season is calculated by dividing the annual number of visitors by the length of beach and multiplying it by the percent of annual visitation occurring during the breeding season.

99. *Comment:* One commenter states that the DEA relies on the Second Administrative Draft Habitat Conservation Plan for the California Department of Parks and Recreation San Luis Obispo Coast District and Oceano Dunes State Vehicular Recreation Area (ODSVRA) to describe plover conservation efforts on ODSVRA. This draft incorrectly states that exclosures occur only as far as pole seven on the beach when in fact they extend further to pole six.

*Our Response:* The DEA relies on the Draft Habitat Conservation Plan to determine the extent of plover fencing at ODSVRA. To the extent that this plan underestimates the length of the restricted area, the DEA may underestimate impacts. The distance between poles six and seven is one half mile.

100. *Comment:* One commenter offers that the DEA should have based its estimate of recreational impacts in OR–9 on the recreation losses estimated as a result of the New Carissa tanker spill in the pre-assessment report. The use of the New Carissa value is valid, because the report estimates losses that recreationists were awarded in a court settlement.

*Our Response:* The value per trip applied in the New Carissa impact study is $14.39 per person per trip compared to $30 assumed in the DEA. However, the DEA estimates a lesser number of visitors experiencing diminished recreation value. For example, the data applied in the DEA estimate 71 visitors to OR–9 in 1999 compared to 18,400 visitors considered in the New Carissa study. The visitor count data used in the New Carissa report are 1999 vehicle count data taken at the BLM boat ramp north of OR–9. Based on information provided by BLM personnel, this visitor data is not an accurate count of visitor use in the critical habitat area. The BLM anticipates that most of the visitors counted in the New Carissa study use the boat ramp and do not access the plover area. To get to the plover area, a visitor would need a four wheeled drive vehicle to access the beach via the South Dike Road. No vehicle count data is available for the South Dike Road. The DEA therefore considers the best available visitor use data for OR–9 to be the Oregon Shore Recreational Use Study that specifically surveyed the beach contained within OR–9.

101. *Comment:* One commenter states that overestimation of impacts is inherent in the following quote from the text box on page 4–5 of the DEA: ''* * * assuming half of the beach is inaccessible as a result of plover conservation efforts approximately 9,200 trips would be lost annually * * *. However, it is unclear what proportion of the visitors using this parking lot are precluded from recreating in these areas proposed for designation as a result of plover conservation efforts.'' The commenter states that it seems there should be no

loss in visitation at this BLM site associated with the plover critical habitat unit.

*Our Response:* The text box on page 4–5 presents information provided by the County Commissioner of Coos Bay, Oregon in contrast to that provided in the DEA. This information is included for comparison but not quantified in the total economic impacts described in the DEA.

102. *Comment:* Two commenters disagree with the DEA's assumption that saltwater fishing trips involve beach vehicle use.

*Our Response:* Information provided by managers and stakeholders during the development of the DEA indicated that vehicles are used to facilitate surf fishing and that surf fishing may therefore be reduced by restrictions on driving. Peer review of the DEA also determined this assumption was reasonable.

103. *Comment:* One comment provided on the DEA states that the regional economic impact model overstates lost regional spending resulting from restricted beach visitation. The commenters opine that spending would simply be redistributed toward substitute goods.

*Our Response:* Section 4.6 of the DEA discusses this limitation of the regional economic impact model, IMPLAN. This model does not assume that spending would occur on substitute goods within the region. To the extent that visitors purchase substitute goods and services in the region, the DEA may overestimate regional economic impacts. The regional economic impacts as estimated, however, are considered to represent a reasonable upper bound of impacts to the local economic as a result of restricting recreational visitation.

104. *Comment:* One comment expressed concern about the sources of data used to estimate reductions in recreational use. The commenters were unable to verify data assumed to be provided by Humboldt County Public Works and BLM's Arcata Office.

*Our Response:* Beach visitation data were not provided by Humboldt County Public Works or BLM's Arcata Office for the DEA. These data were provided by Humboldt County Parks Department. BLM's Arcata office provided information on OHV restrictions, but not visitor attendance.

105. *Comment:* Two comments were provided stating that the number of visitors impacted at Silver Strand State Beach is overstated in the DEA. The number of vehicles and campers counted in 2004 was 97,949.

*Our Response:* Monthly attendance data for Silver Strand State Beach provided by California Department of Parks of Recreation from 2001 to 2005 are used in the DEA. According to these data 326,746 visitors were recorded in 2004. This source was determined to provide the best available data.

106. *Comment:* Two commenters noted that reductions in some types of recreation, such as off-highway vehicle (OHV), or equestrian use, may result in increases in beach trip value for other user groups.

*Our Response:* Exhibit 4–32 of the DEA describes that, to the extent that plover-related vehicle restrictions increases the value of a beach trip for other recreational user groups, the analysis overstates economic impacts to recreational users. Data were not identified, however, that describe the relationship of beach vehicle use and value to the pedestrian or equestrian recreators.

107. *Comment:* One comment asserts that the regional economic impact analysis in the DEA does not take into account the impact to visitors with complex mechanical needs stemming from the use of Recreational Vehicles (RVs), OHVs, and dune buggies.

*Our Response:* As discussed above, in response to comments on the DEA, the IMPLAN regional modeling tool was used to determine regional impacts of restrictions to vehicle use at ODSVRA for San Luis Obispo County, California. Following comment, this revised IMPLAN analysis assumes a greater decrease in local expenditures per trip than used in the DEA based on a study published by the State of California's Department of Parks and Recreation in 1993 on ODSVRA users. Impacts to vehicle recreation-related activities, such as gas and equipment were considered in this analysis, which estimated an of impact of $30.1 million to the regional economy.

108. *Comment:* One commenter expressed concern that while dog-walking has occurred on Sands Beach for decades, recently, the California Coastal Commission has banned dogs from the beach as a result of a land swap deal to protect a nearby bluff.

*Our Response:* Footnote 128 of the DEA discusses the value that beach visitors may have for dog-walking on plover beaches. This comment provides anecdotal evidence that some visitors may experience diminished trip value in the case that this activity is restricted for the purposes of plover conservation. The incremental value that the opportunity for dog-walking may have on the value of a beach trip, however, is unclear.

109. *Comment:* One commenter states that the DEA does not report that approximately 15 acres of CA–18 are owned and managed by the City. Public uses on this 15 acres include fishing, trails, scuba diving, swimming, vista points, windsurfing, and wildlife viewing. Excluding the impact to these recreational uses underestimates the economic impact of plover conservation in this unit. The City of Goleta is in the process of implementing a long-term management plan, covering these 15 acres, that includes plover protection provisions.

*Our Response:* This comment provides new information of recreation taking place on a City beach within the potential plover habitat in Unit CA–18. The DEA does not currently estimate impacts in this area. Additional information would be required on the number and type of visitors and on the potential plover management activities on this beach in order to estimate impacts. That visitors engage in dog walking evidences the positive value of this type of beach recreation, however this value has not explicitly been studied.

110. *Comment:* A commenter states the DEA does not recognize the impacts to recreational activities that occur within Unit CA–1, or the businesses that rely on those activities. The DEA does not recognize the historic use of the area by the general public for uses such as horseback riding, hiking, fishing, OHVs, birding, and camping. The use of the area is promoted as a public access point as part of the County Local Coastal Program, and the County maintains a parking facility at the west end of Kellog Road to serve the general public.

*Our Response:* Based on this information, the DEA likely underestimates impacts to recreation in CA–1 of plover conservation. More information is needed on the extent of recreational activity and of plover conservation efforts in this area, however, before economic impacts may be estimated.

111. *Comment:* One comment states that the DEA did not consider recreational impacts to Kellogg Beach in Unit CA–1.

Our Response: This comment provided did not indicate that plover management would occur at Kellogg Beach that would impact recreation. Further, conversation with Del Norte County did not indicate that plover fencing occurs in this area. To the extent that plover management does occur at Kellogg Beach in the future, the DEA may underestimate impacts to CA–1.

112. *Comment:* One comment states that the DEA underestimates the number of recreational trips lost at Clam Beach, at 55 trips per year, and therefore

underestimates the regional impact of these lost trips.

Our Response: As described in Exhibit 4–30 of the DEA, an average annual loss of 1,109 trips is estimated for Unit CA–3A at Clam Beach. The commenter appears to have assumed that the 1,109 trips lost were estimated over 25 years, when in fact the estimate is annual.

113. *Comment:* According to one commenter, the DEA should include any economic impact on commercial beach fishing.

*Our Response:* In developing the DEA, no information was identified concerning any commercial beach fishing operations within the proposed critical habitat designation. To the extent that commercial beach fishing operations does occur, impacts to these beach users are not incorporated. The extent to which commercial fishers were included in the visitor counts, impacts to these parties were included in the DEA. However, they were assigned a recreational fishing value, which may differ from values of trips to commercial fishers.

114. *Comment:* One comment asserts that the DEA underestimates the regional economic impact of plover conservation efforts. The commenter states that his/her Clam Beach horseback riding business was impacted, harassed, and eventually closed due to plover listing, plover advocates, and agency threats and that $20,000 per year is lost to the community by this business being closed.

*Our Response:* The DEA considers the impact of plover conservation efforts on small recreation-related businesses in this region in Section 4.6.

115. *Comment:* Multiple commenters state that the DEA did not consider potential reductions in property value due to plover-related land use restrictions. For example, according to one comment, property owners within critical habitat will bear ''stigma impacts,'' including ''changes to private property values associated with public attitudes about the limits and costs of implementing a project in critical habitat.'' In contrast, other commenters assert that the DEA suggestion that restricting beach access can only have a negative effect on property values is incorrect and suggest that restricting beach access could have a positive offsetting impact on certain types of property value, particularly beach residents, if beach congestion is reduced. The DEA does not include potential benefits from restricted beach access, or cite relevant hedonic price literature quantifying the relationship between congestion externalities and housing prices.

*Our Response:* Section 1.2.3 of the DEA describes the potential for stigma impacts. More specifically, Section 5.1 of the DEA discusses the potential for plover conservation efforts to affect property values. While property value research demonstrates that proximity and access to beaches may increase the value of a property, research was not identified that correlates the level of beach access to property value. Plover conservation efforts are not anticipated to completely preclude access to beaches, and no data are available to estimate potential percentage decrease in property value if beach access is restricted but not precluded. Section 4.3.2 of the DEA discusses the effect of beach congestion on value of a beach trip, but no literature was identified in the development of the DEA correlating beach congestions and housing price.

116. *Comment:* A comment provided states that while the DEA acknowledges the three development nodes on the Sand City Cost, the Monterey Bay Shores', MacDonald, and Sterling sites, it only considers impacts to the Monterey Bay Shores' site.

*Our Response:* Section 5.3.3 of the DEA describes the impacts of implementing plover conservation efforts in the implementation of the Sand City development project. The DEA acknowledges the three sites that comprise this development project: The McDonald Site, Sterling Site, and Lone Star Site (also referred to as Monterey Bay Shores). The DEA, however, incorrectly refers to the three sites collectively as the ''Monterey Shores development project.'' The description of plover conservation efforts to minimize impacts is from the draft Habitat Conservation Plan (HCP) for the Monterey Bay Shores Project site specifically. The DEA assumes that similar conservation efforts may be required at all three sites. Importantly, however, the economic impacts as quantified in the DEA were obtained from personal communication with the attorney from Sand City and include impacts to the entire Sand City development project.

117. *Comment:* Two commenters assert that the DEA should not include economic impacts to Sand City associated with HCP development. Commenters offers that the California Coastal Commission's (CCC) denial of a development permit for this project was based on a number of reasons involving the project's failure to meet legal standards under California's Coastal Act and was not predicated solely on the presence of plovers on the property. Comment from the CCC asserts that they did not permit the project primarily due to a water availability issue, and not because of the plover.

*Our Response:* Section 5.3.3 of the DEA acknowledges that initial project plans were not permitted for multiple reasons and that it is unclear to what extent the re-planning efforts were driven by the plover. The DEA further acknowledges that consideration of multiple factors influenced the currently proposed mitigation measures associated with the revised plan for development of Sand City, for example the purchase of private lots for open space and development. Particular conservation efforts described such as hiring of full-time plover monitors, however, are clearly related to the plover. The DEA isolates conservation efforts associated with the development that specifically benefit the plover and its habitat for inclusion in the estimate of impacts to Sand City. Of note, Unit 12C of the proposed critical habitat, which contains this proposed development site, is excluded from final critical habitat.

118. *Comment:* One commenter states that the DEA's assumption that there will be no development impacts on the Oxfoot Property (Unit CA–7) is unreasonable. The commenter asserts that the Dillon Beach site will likely be developed in some fashion during the next 20 years and that the lack of a current formal development application is not a basis for concluding that none will occur. This comment further states that when development is proposed, the permitting authority will impose land use and beach access restrictions related to plover critical habitat. Because beach access has a positive effect on property value, the commenter states that restricting beach access to future development will have a negative effect on property value.

*Our Response:* Section 5.3.4 of the DEA acknowledges the development potential of Dillon Beach within Unit CA–7. Communication with the Marin County Planning commission indicated that development projects in the area in the past have not been influenced by the plover or habitat. During the development of the DEA, the commenter provided plans for the proposed Lawson Family Dillon Beach Resort, which were developed in 1995–1996 and included a memorandum on environmental constraints associated with the project which was reviewed by the County in preparing the Dillon Beach Community Plan. This memorandum highlighted impacts to special status species within the vicinity of the proposed project site. The plover

is not included in this list and the memorandum concludes that other wildlife species are not found at the site. It is therefore considered unlikely that plover conservation efforts would be a condition of permitting for this or similar development projects within the Dillon Beach area.

119. *Comment:* One commenter states that, ''there will be future costs for administration of habitat conservation plans for the private lands within Area CA–1,'' that are not captured in the DEA. For example, administrative costs of section 7 consultation associated with breaching of Lake Earl are not included.

*Our Response:* As described in Section 5.3.4, Unit CA–1 is within Del Norte County, California and is 87 percent private lands. While attempts to develop the area have occurred, it has not been permitted for various reasons unrelated to the plover. Primarily the water table is very high in this area. Breaching of the adjacent lake would need to occur more often in order to make development possible, but the lake breaching presents an issue for the endangered tidewater goby. (Note that breaching of the lake could be beneficial to the plover.) No information was uncovered in the development of the DEA indicating future habitat conservation plans for the plover in this unit. Past consultation in 2003 on the lake breaching did not result in any conservation efforts for the plover. The consultation did, however, consider impacts of the project to the plover and administrative costs are therefore captured. In the case that consultation were to occur for the similar breaching efforts in the future, the DEA underestimates the administrative costs of considering the plover, although no plover-related conservation efforts are expected to result consistent with previous consultations on the same project.

120. *Comment:* According to one comment, the DEA does not include the economic loss of potential reduced campground development in Unit CA–3A, Clam Beach/Little River.

*Our Response:* As detailed in Section 5.3.3 of the DEA, Humboldt County Public Works estimates that in the case that plover conservation efforts limit the planned expansion of the existing public campgrounds in Humboldt County, the County could lose up to $30,000 per year in unrealized revenue. This impact is included in the DEA.

121. *Comment:* According to a comment, the DEA underestimates management costs for ODSVRA. The DEA estimates that from 1993 to 2000, California Department of Parks and Recreation spent approximately $200,000 annually on plover management, almost all of which was spent at Oceano Dunes. Those costs increased to $750,000 per year from 2001 to 2004. Future management costs at ODSVRA are expected to exceed $750,000 per year going forward. No mention is made, however, of the recent settlement of litigation between California Department of Parks and Recreation and Sierra Club, in which State Parks committed to spending in excess of $500,000 in plover conservation and monitoring efforts.

*Our Response:* Paragraph 100 of the DEA describes the expected expenditures for plover management by California Department of Parks and Recreation as a result of the litigation referenced in this comment. The future management costs of $750,000 per year referenced above, and incorporated in the DEA's impact estimate, includes the $500,000 for plover management resulting from the consent decree between California Department of Parks and Recreation and the Sierra Club.

122. *Comment:* One comment suggests the DEA underestimates management costs at California Department of Parks and Recreation sites by not using the average cost to protect a plover nest at ODSVRA of $5,700 per nest. The DEA instead uses an estimate of $750 per nest for other sites.

*Our Response:* Paragraphs 99 and 100 of the DEA discuss California Department of Parks and Recreation per nest management costs. As highlighted elsewhere in this comment, ODSVRA is unique when compared to all other California Department of Parks and Recreation sites, in that it provides large-scale vehicular recreation and camping on the dunes. California Department of Parks and Recreation provided an estimate of future management costs of $300,000 annually for all sites other than ODSVRA and $750,000 annually for ODSVRA. These estimates were divided by the number of nests present to determine a per nest cost. The per nest cost is used in the DEA to estimate management expenditures at each unit as expenditures are not tracked by California Department of Parks and Recreation according to individual unit. It is therefore not appropriate to apply per nest management costs estimated for ODSVRA to other California Department of Parks and Recreation sites.

123. *Comment:* One commenter asserts that the DEA should consider cost savings resulting from converting from daily, weekly, or other raking, to less frequent raking schemes.

*Our Response:* The mechanical beach cleaning restrictions estimated in Section 4.5.2 of the DEA occur entirely within Los Angeles County. The County indicated that the Los Angeles County Fire Department—Lifeguard Division requires that the tide line be raked daily to create an even surface for safe emergency vehicular response and for general safety patrol. In addition, if mechanized beach cleaning were reduced the county would have to hire additional staff to manually clean the required beaches. Therefore, no cost savings are anticipated associated with decreasing the frequency of beach raking in Los Angeles County.

124. *Comment:* One commenter states that cost estimates for management and monitoring appear to have been exaggerated in the DEA by including staff and contractor activities not specifically related to the presence or potential presence of plovers. For example, Silver Strand State Beach has limited beach raking, and Border Field State Park has no beach raking related to plover.

*Our Response:* The DEA agrees with this comment and does not estimate any impacts of reduced beach raking for either of these sites.

125. *Comment:* One comment asserts that cost estimates for management and monitoring are overstated at Border Field State Park. Monitoring, management, and fencing at this park are focused on the California least tern and no areas are specifically closed due to the presence of plover.

*Our Response:* Management costs estimated in Section 3 for this assume that California State Parks will spend $750 per nest for plover management, which includes construction of exclosures and symbolic fencing, dog prohibitions, and predator controls. These efforts have been undertaken at other California State Parks and are therefore assumed to be potentially relevant at other State Parks that support the plover in the future. As described in Section 4 of the DEA does not estimate any recreational losses in this unit.

126. *Comment:* According to one commenter, impacts calculated for Unit CA–12A, Jetty Road to Aptos are based on the future use of exclosures. While it is true exclosures have been used in the past, they may not necessarily be in the future. For example, in the 2005 breeding season no exclosures were used on this beach section.

*Our Response:* The DEA assumes past management efforts may continue into the future in the case that the area is designated as critical habitat. To the extent that plover fencing or exclosures

are not constructed, the DEA likely overestimates the impacts of plover conservation efforts at this site. Unit 12A has been excluded from final critical habitat designation.

127. *Comment:* One commenter states that the DEA does not include any economic impacts of predator control.

*Our Response:* Sections 3.1 and 3.2 of the DEA discuss and quantify management costs, including predator control.

128. *Comment:* A comment provided on the DEA requests that the range in gravel mining costs related to plover monitoring be explained.

*Our Response:* Paragraph 335 of the DEA summarizes impacts to gravel mining. Gravel mining costs are expected to range from $5,000 to $50,000 for plover monitoring. The range is great as costs depend on whether and where the plovers are located in the area. Costs may increase, for example, if plovers are in the proposed extraction area.

129. *Comment:* One comment states that the DEA does not properly distinguish property ownership and cost associated with North Island North (CA–27A) and North Island South (CA–27B). North Island North is Naval Base Coronado. The Department of Defense (DOD) owns land in both units but are listed in Exhibit 3–4 as private. Further, North Island South costs are included as DOD costs but the property is primarily owned and managed by City of Coronado.

*Our Response:* The Proposed Rule states that both subunits are located entirely on land owned by the Department of Defense. Exhibit 3–4 of the DEA however, incorrectly identifies the land manager as private. The DEA does not estimate costs other than military for these two subunits as described in Section 6.2.2. Therefore, this correction is purely descriptive and does not affect impact estimates.

130. *Comment:* One commenter states that the DEA should include costs attributable to section 7 consultations, law enforcement, or additional expenses to public works related to plover conservation efforts.

*Our Response:* Section 3.3 of the DEA quantifies the administrative costs of section 7 consultation; Sections 3.1 and 3.2 quantify and discuss management costs, including law enforcement costs where appropriate. Further, impacts to public works project, such as the Humboldt County camp grounds, are considered in the DEA.

131. *Comment:* One commenter highlights that paragraph 18 of the DEA does not acknowledge that the HCP developed by the California State Parks for Oceano Dunes is only a draft and includes several state park units in the San Luis Obispo County in addition to Oceano Dunes State Vehicular Recreation Area.

*Our Response:* Paragraph 100 acknowledges the draft HCP includes Estero Bluffs, Morro Strand State Beach, Montana Del Oro State Park, Pismo Dunes Natural Preserve, and Oceano Dunes State Vehicular Recreation Area.

**Summary of Changes From the Proposed Rule**

In developing the final critical habitat designation for the Pacific Coast WSP, we reviewed public comments received on the proposed designation of critical habitat published December 17, 2004 (69 FR 75608), and the draft economic analysis published on August 16, 2005 (70 FR 48094); conducted further evaluation of lands proposed as critical habitat; refined our mapping methodologies; and excluded additional habitat from the final designation. Table 1, included in the ''Critical Habitat Designation'' section, outlines changes in acreages for each subunit where changes occurred between the proposed rule published on December 17, 2004 (69 FR 75608) and this final rule. In addition to clarifications in the text pertainting to units or subunits, we made changes to our proposed designation as follows:

(1) We mapped critical habitat more precisely by eliminating habitat areas of marginal quality that we do not expect to be used by Pacific Coast WSP. In certain locations, we determined that habitat had been degraded by extensive stands of non-native vegetation where beach managers are unable to plan dune system restoration due to shortages in funding or staff. In some instances, habitat may have also been degraded by overuse by humans, such as at OHV parks. As a result, the following critical habitat units had adjustments to their boundaries. The rationale for each adjustment is provided under the unit description. The affected critical habitat units are: CA 1, CA 15B, CA 16, and CA 19B.

(2) Several military areas were exempted from critical habitat designation due to their legally operative INRMPs. In addition, three National Wildlife Refuges were found to not to meet the definition of critical habitat under section 3(5)(a) of the Act, and were removed from the designation. Finally, several areas were excluded from critical habitat under section 4(b)(2) of the Act. These areas were excluded either for national security reasons, operative habitat conservation plans, or because of the high economic costs of critical habitat designation. For a complete description of these areas, please see the section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act.

(3) Although we attempted to remove as many areas of unsuitable habitat to Pacific Coast WSP as possible before publishing the proposed rule, we were not able to eliminate all of them. As a result, the final rule represents a more precise delineation of essential habitat containing one or more of the primary constituent elements. This correction resulted in a reduction in the total acreage published in the proposed rule. The affected critical habitat units are: CA 4D, and CA 19A, which contained areas in the proposed rule that were removed in the final designation. Some other designated units may also contain small portions which do not contain the primary constituent elements. Since it is not possible to remove each and every area that may be unsuitable Pacific Coast WSP habitat, even at the refined mapping scale used, the maps of the designation still may include areas that do not contain primary constituent elements. These areas lacking the primary constituent elements at time of the final rule's publication are not designated as critical habitat.

(4) Some mapping errors occurred in the proposed critical habitat rule for the Pacific Coast WSP, resulting in misnaming a proposed unit, an error in the depiction of unit boundaries, or in supplying the wrong UTMs (Universal Transverse Mercator) in a unit's legal description. The affected units corrected in this final rule are CA 4D, CA 12C, and CA 22. Refer to the specific unit description for corrections.

(5) The Unoccupied Areas Identified for Possible Inclusion presented in the proposed rule were determined not to be essential to the conservation of the species. Consequently, we are not designating those areas in Washington and Oregon that were not occupied at the time of listing in 1993. Those units are WA 1, OR 1A, OR 1B, OR 2, OR 4, OR 5A, OR 5B, OR 6, OR 8, OR 10B, OR 10C, OR 11, and OR 12.

(6) An error was made during development of the proposed rule concerning the occupancy of CA 11A at the time of listing. We mistakenly stated that CA 11A (Waddell Creek, Santa Cruz County, California) was unoccupied during 1993, resulting in us not formally proposing this subunit as critical habitat. We were referred to data in our possession at the time of listing indicating that breeding plovers were present at Waddell Creek in 1991, and again in 1995. No surveys were

conducted during the interim period. Consequently, we assume CA 11A was occupied at the time of listing, thereby fully meeting our designation criteria as critical habitat.

We present brief descriptions below of the changes that have been made to units from those proposed or considered under the proposed rule (69 FR 75608), and provide the rationale for their change. A more complete discussion of changes is provided in the unit descriptions for those units that are designated as critical habitat. The critical habitat features essential for the conservation of the Pacific Coast WSP are defined in the ''Primary Constituent Elements'' section below. All designated units are located within the range of the population, in the States of Washington, Oregon, and California. They are all considered currently occupied (with documented use by plovers since 2000), unless otherwise noted.

*Washington*

WA 4, Leadbetter Point/Gunpowder Sands, 832 ac (337 ha): The portion of the spit within the Willapa National Wildlife Refuge does not meet the definition of critical habitat in section 3(5)(a) of the Act, as it does not require special management. As a result, the unit size has decreased to its designated 832 acres (337 ha) from its proposed 1,069 acres (433 ha) with the exclusion of the Refuge.

*Oregon*

OR 8, (Subunits OR 8A and OR 8B): A number of changes to the Siltcoos River Spit (OR 8A) and Dunes Overlook/Tahkenitch Creek Spit (OR 8B) subunits were made in response to public comment. The changes reduced the total size of the unit from 563 to 535 acres and included: (1) Creating a new smaller unit (Siltcoos Breach) from the northern portion of OR 8A; (2) locating the northern boundary of OR 8A 0.6-miles north of the Siltcoos River; and (3) combining proposed subunits OR 8B with OR 8A. These modifications better reflect the current biological and management conditions at the site since they designate an important wintering area (the Siltcoos Breach), support the existing snowy plover management areas, and provide consistency with the *Draft Habitat Conservation Plan for the Western Snowy Plover* (Oregon Parks and Recreation Department 2004).

*California*

CA 1, Lake Earl, 57 ac (24 ha): The portion of the proposed unit extending north to Kellogg Road, has been dropped from the final critical habitat designation, reducing the size of the unit from 91 acres (37 ha) to the designated 57 acres (24 ha). The narrow portion of the proposed unit that extended along the Pacific Shores housing development was eliminated from the final rule because of information received regarding the dense stands of non-native European beachgrass along an already narrow beach, the slope of the beachfront, and intensive use by OHVs. These combined factors make the northern portion of the proposed unit non-essential habitat. As a consequence, the unit's northern boundary has been moved to exclude the private property. The southern boundary has been changed to extend slightly to the south onto State Park property.

CA 4D, Eel River Gravel Bars, 1,190 ac (481 ha): The overall acreage of this unit has changed from the proposed 1,193 ac (483 ha) due to information received regarding the inclusion of developed properties managed by the California Department of Transportation. The three acres containing road developments have been dropped from the final designation, and are considered a mapping error.

CA 7, Dillon Beach, 30 ac (12 ha): This unit was excluded from critical habitat designation under section 4(b)(2) of the Act, primarily based upon the landowner's willingness to enter a partnership ensure conservation (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

CA 12A, Jetty Road to Aptos, 272 ac (110 ha): This subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

CA 12C, Monterey to Moss Landing, 788 ac (319 ha): We have corrected a mapping error which was made during preparation of the proposed rule; to correct that error, we have removed 15 ac from the final designation. The remainder of this subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

CA 15B, Atascadero Beach, 101 ac (40 ha): A 43-ac (17 ha) portion of this subunit managed by the City of Morro Bay was removed from the proposed subunit because we determined that this area is not essential to the conservation of the plover. The remainder of this subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

CA 16, Pismo Beach/Nipomo Dunes, 969 ac (392 ha): A 300-ac (121.4-ha) heavily used open riding area within Oceano Dunes State Vehicular Recreation Area was removed from the proposed unit because we determined that this area is not essential to the conservation of the plover. The remainder of this subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

CA 17, Vandenberg Air Force Base, 930 ac (376 ha): This unit, comprised of subunits CA 17A and CA 17B, is located on Vandenberg Air Force Base in Santa Barbara County, California. We have excluded all essential lands in this unit from the final critical habitat designation under section 4(b)(2) of the Act (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

CA 19A, Mandalay Beach to Santa Clara River, 410 ac (166 ha): As stated in the unit description in the proposed rule (69 FR 75608), this subunit extends 6.1 mi (9.8 km) north along the coast from the north jetty of the Channel Islands harbor to the Santa Clara River. However, the map of this subunit (Map 54), as published in the proposed rule, depicted this unit as starting about 1 mile north of the jetty (Hollywood Beach). We have corrected the map of subunit 19A to display the complete subunit, which includes Hollywood Beach.

CA 19B, Ormond Beach, 175 ac (71 ha): We removed a 28-ac (11 ha) area of subunit CA 19B, from the J Street drainage to the south jetty of Port Hueneme, because it is a highly disturbed and a heavily used recreational area. We determined that the area removed is not essential to the conservation of the plover.

CA 19C, Mugu Lagoon North, 321 ac (130 ha): This subunit is owned entirely by the Department of Defense (Naval Base Ventura). Naval Base Ventura County has a final approved INRMP that provides a conservation benefit to the western snowy plover. We have now determined that the Naval Base Ventura County is exempted under 4(a)(3) of the Act and thus these lands are removed from final designation.

CA 19D, Mugu Lagoon South, 87 ac (35 ha): This subunit is mostly owned

by Department of Defense (Naval Base Ventura). Based on a final INRMP which the Secretary has determined provides a benefit to the plover, the military portion is therefore exempted under section 4(a)(3) of the Act. However, there is a 18.3-ac (7.4 ha) section at its southern end of the subunit which extends into Pt Mugu State Park, owned and managed by the California Department of Parks and Recreation. The portion within the State Park is designated as critical habitat.

CA 22B, Bolsa Chica State Beach, 4 ac (2 ha): This subunit was mislabeled during the proposed rule process. The correct name, shown here for subunit CA 22B, is Bolsa Chica State Beach. The UTMs for the unit's legal description were also presented in error during the proposed rule, and are correctly provided with the subunits map. The overall acreage and ownership remain the same, as does the subunit's narrative description provided in the proposed rule (69 FR 75608).

CA 24, San Onofre Beach, 40 ac (16 ha): We have refined our mapping for Unit CA 24 to more accurately define the essential snowy plover habitat between San Onofre Creek and San Mateo Creek. The majority of snowy plover use in this area currently is located in a less visited portion of the beach closer to the mid-point between the two creek mouths. The result of this refined mapping is a reduction in the length of the proposed unit at both ends, removing critical habitat from Green Beach as well as beach areas to the north of San Mateo Creek mouth.

CA 27A, North Island/Coronado, 117 ac (47 ha): This subunit is exempted under section 4(a)(3) of the Act because of their approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

Subunit CA 27C, Silver Strand, 99 ac (40 ha): All Navy lands within subunit CA 27C are exempted under section 4(a)(3) of the Act because of their approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). The remainder of this subunit (Silver Strand State Beach) was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).

Subunit CA 27D, Delta Beach, 85 ac (35 ha): All lands within subunit CA 27D have been exempted under section 4(a)(3) of the Act because of the Navy's approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

**Critical Habitat**

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species must first have features that are ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species at the time of listing.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. They require Service biologists to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing package for the species. Additional information sources include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. All information is used in accordance with the provisions of section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658) and the associated Information Quality Guidelines issues by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of what we know at the time of designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the

action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

**Methods**

As required by section 4(b)(1)(A) of the Act, we used the best scientific and commercial data available in determining areas that contain habitat features essential to the conservation of the Pacific Coast WSP. Data sources include research published in peer-reviewed articles; previous Service documents on the species, including the original critical habitat designation (Service 1999) and final listing determination (Service 1993); numerous surveys; and, aerial photographs and GIS mapping information from State sources and our files. We designated no areas outside the geographical area presently occupied by the species.

We have also reviewed available information that pertains to the habitat requirements of this species. Sources of information include data in reports submitted during section 7 consultations and by biologists holding section 10(a)(1)(A) recovery permits; research published in peer-reviewed articles and presented in academic theses and agency reports; regional Geographic Information System (GIS) coverages; and data colleted in support of Habitat Conservation Plans and other local, State, and Federal planning documents.

Four steps were conducted to identify critical habitat units. First, we identified those areas occupied by the Pacific Coast WSP at the time of listing. Secondly, we identified, in accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, the physical and biological habitat features (also called primary constituent elements, or PCEs) at those sites that are essential to the conservation of the species. We mapped critical habitat unit boundaries at each site based on the extent of habitat containing sufficient PCEs to support biological function. The mapping itself was the third step, while the fourth and final step was to find that certain units, which do not require special management, do not meet the definition of critical habitat under section 3(5)(A) of the Act, and to exempt other units that are subject to an approved INRMP that provides a benefit to the species under section 4(a)(3), and to exclude certain units based on section 4(b)(2) of the Act (see the Application of Section 3(5)(A) and 4(a)(3) and Exclusion under Section 4(b)(2) of the Act, below, for a detailed description). We discuss each of these steps more fully below in the section titled ''Criteria Used to Identify Critical Habitat'.

Our mapping process was based on the need to exclude areas that lack PCEs, while simultaneously accounting for the dynamic nature of beach habitat. Our mapping process also allowed us to provide a reasonable level of certainty to landowners regarding the location of unit boundaries relative to private lands.

We used Geographic Information Systems (GIS) software to establish landward bounds for those breeding and wintering sites that meet the criteria identified under the section titled ''Criteria Used to Identify Critical Habitat''. We drew the landward bounds so as to exclude habitat lacking PCEs, as determined using the most recent digital orthorectified aerial photographs available. We also incorporated appropriate input regarding PCEs received during the public comment periods. We set the landward bounds to remain fixed in place, defined by the UTM North American Datum 27 coordinates of their vertices and endpoints, because most private land is located near the landward bounds, and because the landward side of the unit is likely to change less over time than other boundaries.

We depict the mapped shoreline, or waterline, bounds of each unit according to mean low water (MLW), including waters of the Pacific Ocean proper, bays, estuaries, and rivers where water level is significantly influenced by tides. However, the actual critical habitat designation includes the intertidal zone extending to the water's edge. Use of the shoreline, or water's edge, as a boundary provides an easy-to-find landmark when visiting one of the designated critical habitat units. The water's edge incorporates essential habitat features that are constantly changing due to tides and wave action, beach erosion and aggradation, deposition of driftwood and stabilization due to vegetation growth, shifting windblown sand dunes, and other processes. For purposes of estimating unit sizes, we approximated MLW in California using the most recent GIS projection of MHW. We chose MHW because it is the only approximation of the coastline currently available in GIS format. We were unable to obtain recent GIS maps of MHW or MLW for Oregon and Washington. Therefore, we approximated MLW for units in those States based on aerial photographs.

**Primary Constituent Elements**

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements (PCEs)) that are essential to the conservation of the species, and that may require special management considerations and protection. These include, but are not limited to: Space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific primary constituent elements for the Pacific Coast WSP are derived from the biological needs of the Pacific Coast WSP as described in the previously published in our recent re-proposal of critical habitat, published on December 17, 2004 (69 FR 75608).

*Space for Individual and Population Growth, and Normal Behavior*

Pacific Coast WSPs establish nesting territories, but these can vary widely in size and do not provide adequate habitat for foraging. Pacific Coast WSP broods rarely remain in the nesting area until fledging (Warriner *et al.* 1986, Stern *et al.* 1990), and may travel along the beach as far as 4 miles (6.4 kilometers from their natal area )(Casler *et al.* 1993). Critical habitat must therefore extend beyond nesting territories to include space for foraging and water requirements during the nesting season, and space for over wintering.

*Food and Water*

Pacific Coast WSPs typically forage in open areas by locating prey visually and then running to seize it with their beaks (Page *et al.* 1995a). They may also probe in the sand for burrowing invertebrates, or charge flying insects that are resting on the ground, snapping at them as they flush. Accordingly, they need open areas to forage and facilitate both prey location and capture. Areas with deposits of tide-cast wrack (*e.g.*, kelp or driftwood) provide important foraging sites because they attract certain

invertebrates that plovers consume (Page *et al.* 1995a). Plovers forage both above and below high tide, but not while those areas are underwater. Therefore, foraging areas will typically be limited by water on their shoreward side and by dense vegetation or development on their landward sides.

Coastal plovers use sites of fresh water for drinking where available. However, some historic nesting sites have no obvious nearby freshwater sources, particularly in southern California. Researchers assume that adults and chicks in these areas obtain their necessary water from the food they eat. Accordingly, we have not included freshwater sites among the primary constituent elements of the Pacific Coast WSP population.

*Reproduction and Rearing of Offspring*

Pacific Coast WSPs nest in depressions that are open, relatively flat, and near tidal waters but far enough away to avoid being inundated by daily tides. Typical substrate is beach sand, although plovers are known to lay eggs in existing depressions with harder ground such as salt pan, cobblestones, or dredge tailings. Where available, dune systems with numerous flat areas and easy access to the shore are particularly favored for nesting. Additionally, plover nesting areas require shelter from predators and human disturbance, as discussed below. If nesting is successful, unfledged chicks will forage with one or both parents, using the same foraging areas and behaviors as adults.

*Cover or Shelter*

Plovers and their eggs are well camouflaged against light colored, sandy or pebbly backgrounds (Page *et al.* 1995a). Therefore, open areas with such substrates actually constitute shelter for purposes of nesting and foraging. Such areas provide little cover to predators, and allow plovers to fully utilize their camouflage and running speed. Chicks may also crouch near driftwood, dune plants and piles of kelp to hide from predators (Page and Stenzel 1981). Consequently, open areas do not provide shelter from wind and storms. These weather events are known to cause many nest losses, along with extreme high tides. Plovers readily scrape blown sand out of their nests, although there is little they can do to protect the nests against serious storms or flooding other than attempting to lay a new clutch if one is destroyed (Page *et al.* 1995a).

No studies have quantified the amount of vegetation cover that would make an area unsuitable for nesting or foraging. However, coastal nesting and foraging locations typically have relatively well-defined boundaries between the favorable open sandy substrates and the unfavorable dense vegetation that occurs inland. Such boundaries are clearly visible in aerial and satellite photographs and therefore were used by us to map essential habitat features for this species.

*Undisturbed Areas*

Disturbance of nesting or brooding plovers by humans and domestic animals is a major factor affecting nest success of the Pacific Coast WSP. Plovers leave their nests when humans or pets approach too closely. Dogs may also deliberately chase plovers and trample nests, while vehicles may directly crush adults, chicks or nests, separate chicks from brooding adults, and interfere with foraging (Warriner *et al.* 1986, Service 1993 Ruhlen *et al.* 2003). Additionally, repeated flushing of incubating plovers exposes the eggs to the weather and deplete energy reserves needed by the adult. As a result, this could lead to reductions in nesting success. Surveys from 1994 to 1997 at Vandenberg Air Force Base, California, found the rate of nest loss on southern beaches with higher recreational use to be consistently higher than on north beaches where recreational use was much lower (Persons and Applegate 1997). Ruhlen *et al.* (2003) found that increased human activities on Point Reyes beaches resulted in a lower chick survival rate. Additionally, recent efforts (*i.e.*, use of docents, symbolic fencing, and public outreach) in various locations throughout the Pacific Coast WSP's range to direct recreational beach use away from nesting plovers, has resulted in higher reproductive success positively correlated with protection efforts in these areas (Page, *et al.* 2003 (summer 93 survey), Palermo 2004).

*Primary Constituent Elements for Pacific Coast WSP*

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the Pacific Coast WSP's primary constituent elements are:

(1) Sparsely vegetated areas above daily high tides (*e.g.*, sandy beaches, dune systems immediately inland of an active beach face, salt flats, seasonally exposed gravel bars, dredge spoil sites, artificial salt ponds and adjoining levees) that are relatively undisturbed by the presence of humans, pets, vehicles or human-attracted predators;

(2) Sparsely vegetated sandy beach, mud flats, gravel bars or artificial salt ponds subject to daily tidal inundation but not currently under water, that support small invertebrates such as crabs, worms, flies, beetles, sand hoppers, clams, and ostracods; and,

(3) Surf or tide-cast organic debris such as seaweed or driftwood located on open substrates such as those mentioned above (essential to support small invertebrates for food, and to provide shelter from predators and weather for reproduction).

All areas designated as critical habitat for the Pacific Coast WSP were occupied by the species at the time of listing and contain sufficient primary constituent elements to support essential biological function. These primary constituent elements were identified on the bases that they are essential for Pacific Coast WSP reproduction, food supplies, and shelter from predators and weather elements. Additionally, these areas are essential because they provide protection from disturbance and space for growth and normal behavior.

*Unoccupied Areas Identified for Inclusion*

The Act has different standards for designation of critical habitat in occupied and unoccupied habitat. For areas occupied by the species, these are—(i) the specific areas on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection. For areas not occupied, a determination is required that the entire area is essential for the conservation of the species before it can be included in critical habitat.

Our proposed rule included a section containing Unoccupied Areas Identified for Inclusion, for which we requested comment regarding whether they should be included (in whole or in part) in the designation. Those areas identified for specific review were: WA 1, OR 1A, OR 1B, OR 2, OR 4, OR 5A, OR 5B, OR 6, OR 8C, OR 10B, OR 10C, OR 11, and OR 12. We also asked for comment on the appropriateness of designating areas that were occupied at the time of listing but are currently unoccupied.

Although public comment was generally favorable towards including the unoccupied areas in final critical habitat designation, we are designating only areas actually occupied at the time of listing in 1993 because we do not believe that the unoccupied areas are essential to the conservation of the species. Most of the unoccupied habitat considered for designation was in Oregon, where a State-wide effort is

underway to improve the survival and recovery of the Pacific Coast WSP through the development of a Habitat Conservation Plan. Additionally, the western snowy plover is State listed throughout Oregon, thereby already receiving regulatory protection beyond that associated with the Act. No areas outside of the range of the Pacific Coast WSP have been designated as critical habitat in this final rule.

**Criteria Used To Identify Critical Habitat**

To identify sites containing habitat features essential to the conservation of the Pacific Coast WSP (as defined above in our Methods section), we applied the following three criteria:

(1) Our first criterion for critical habitat unit selection was to choose sites in a geographic region capable of supporting breeding plovers. Where appropriate, we adjusted our estimates of the number of breeding birds a site could support according to additional information supplied by surveys and by local species and habitat experts.

(2) We added any major, currently occupied wintering sites not already selected under criterion one. This was necessary to provide sufficient habitat for the survival of breeding birds during the non-breeding season. A ''major'' wintering site must support more wintering birds than average for the geographical region.

(3) Finally, we added additional sites that provide unique habitat, or that are situated to facilitate interchange between otherwise widely separated units. This criterion is based on standard conservation biology principles for the conservation of rare and endangered animals and their habitats (Shaffer 1981, 1987, 1995; Fahrig and Merriam 1985; Gilpin and Soule 1986; Goodman 1987a, 1987b; Stacey and Taper 1992; Mangel and Tier 1994; Lesica and Allendorf 1995; Fahrig 1997; Noss and Csuti 1997; Huxel and Hastings 1998; Redford and Richter 1999; Debinski and Holt 2000; Sherwin and Moritz 2000; Grosberg 2002; and, Noss *et al.* 2002). By protecting a variety of habitats and facilitating interchange between them, we increase the ability of the species to adjust to various limiting factors that affect the population, such as predators, disease, major storms, and inbreeding.

We are designating critical habitat on lands that we have determined are occupied at the time of listing and contain the PCEs.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to minimize and mitigate the impacts of the requested incidental take. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. Those HCPs that meet our issuance criteria and have been released for public notice and comment have been excluded from final critical habitat (see Table 2).

When determining critical habitat boundaries, we made every effort to avoid proposing the designation of developed areas such as buildings, paved areas, boat ramps and other structures that lack PCEs for the Pacific Coast WSP. Any such structures inadvertently left inside proposed critical habitat boundaries are not considered part of the proposed unit. This also applies to the land on which such structures sit directly. Therefore, Federal actions limited to these areas would not trigger section 7 consultations, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

A brief discussion of each area designated as critical habitat is provided in the unit descriptions below. Additional detailed documentation concerning the essential nature of these areas is contained in our supporting record for this rulemaking.

When designating critical habitat, we assess whether the areas determined to be occupied at the time of listing and contain the PCEs may require special management considerations or protections.

**Special Management Considerations or Protections**

When designating critical habitat, we assess whether the areas determined to contain habitat features essential for conservation may require special management considerations or protections. The threats affecting the continued survival and recovery of the Pacific Coast WSP within each of the proposed critical habitat units and that may require special management are described in the critical habitat unit descriptions in our December 17, 2004, proposed rule (69 FR 75608). Primary threats requiring special management considerations include disturbance of nesting or foraging plovers by humans, vehicles, and domestic animals, high levels of predation on eggs and young, and loss of habitat due to development and encroachment of dune-stabilizing vegetation such as European beachgrass (*Ammophila arenaria*) (Service 1993).

The areas designated as critical habitat for the Pacific Coast WSP will require some level of management and/or protection to (1) address the current and future threats to the species; and, (2) maintain the primary constituent elements essential to its conservation in order to ensure the overall conservation of the species. The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the plover. Federal activities that may affect those unprotected areas outside of critical habitat are still subject to review under section 7 of the Act if they may affect the Pacific Coast WSP. The prohibitions of section 9 (e.g., prohibitions against killing, harming, harassing, capturing plovers) also continue to apply both inside and outside of designated critical habitat.

**Critical Habitat Designation**

We are designating 32 units in Washington, Oregon, and California as critical habitat for the Pacific Coast WSP. All these units are within the range occupied by the species, and constitute our best assessment at this time of the areas containing habitat features essential for the conservation of the Pacific Coast WSP. The areas designated as critical habitat are outlined in Table 2 below.

Tables 1 and 2 show the approximate area not included in critical habitat pursuant to sections 3(5)(A), 4(a)(3) and 4(b)(2) of the Act (Table 1), and the approximate area designated as critical habitat for the Pacific Coast WSP by land ownership and State (Table 2).

TABLE 1.—APPROXIMATE AREA AC (HA) NOT INCLUDED IN CRITICAL HABITAT FOR THE PACIFIC COAST WSP PURSUANT TO SECTIONS 3(5)(A), 4(A)(3) AND 4(B)(2) OF THE ACT

| Unit | Size | | Basis of exclusion | |
|---|---|---|---|---|
| | Acres | ha | | |
| WA 4. Leadbetter Pt | 270 | 109 | Mgt. Plan | 3(5)(A) |
| CA 7. Dillon Beach | 30 | 12 | Conserv. Agreement | 4(b)(2) |
| San Francisco Bay | 1,847 | 747 | Mgt. Plan | 4(b)(2) |
| CA 12A. Jetty Rd. to Aptos | 272 | 110 | Economics | 4(b)(2) |
| CA 12C. Monterey to Moss Lnd | 803 | 325 | Mgt. Plan economics | 3(5)(A)/4(b)(2) |
| CA 15B. Atascadero | 144 | 58 | Economics | 4(b)(2) |
| CA 15C. Morro Bay | 611 | 247 | Economics | 4(b)(2) |
| CA 16. Pismo Beach/Nipomo Dunes | 1,269 | 513 | Mgt. Plan/economics | 3(5)(A)/4(b)(2) |
| CA 17A. Vandenberg North | 626 | 253 | National Security | 4(b)(2) |
| CA 17B. Vandenberg South | 304 | 123 | National Security | 4(b)(2) |
| San Nicholas Island | 534 | 212 | INRMP | 4(a)(3) |
| CA 19C. Magu Lagoon | 321 | 130 | INRMP | 4(a)(3) |
| CA 19D. Magu Lagoon | 69 | 28 | INRMP | 4(a)(3) |
| Camp Pendleton | 49 | 20 | INRMP | 4(a)(3) |
| San Diego MSCP/HCP | 23 | 9 | Mgt. Plan | 4(b)(2) |
| CA 27A. North Island | 117 | 47 | INRMP | 4(a)(3) |
| CA 27C. Silver Strand | 174 | 70 | INRMP/economics | 4(a)(3)/4(b)(2) |
| CA 27D. Delta Beach | 85 | 35 | INRMP | 4(a)(3) |
| Total | 7,548 | 3048 | | |

The rationale for the use of an exclusion or exemption is provided in the sections below discussing the application of section 3(5)(A) and 4(a)(3) and exclusions under Section 4(b)(2) of the Act.

TABLE 2.—CRITICAL HABITAT UNITS DESIGNATED FOR THE PACIFIC COAST WSP

| Unit | Federal | | State/local | | Private | | Total | |
|---|---|---|---|---|---|---|---|---|
| | acres | ha | acres | ha | acres | ha | acres | ha |
| Washington: | | | | | | | | |
| WA 2. Damon Pt., Oyhut | 0 | 0 | 908 | 368 | 0 | 0 | 908 | 368 |
| WA 3. Midway Beach | 0 | 0 | 266 | 108 | 520 | 210 | 786 | 318 |
| WA 4. Leadbetter Pt | 0 | 0 | 832 | 337 | 0 | 0 | 832 | 337 |
| Subtotal | 0 | 0 | 2006 | 813 | 520 | 210 | 2526 | 1023 |
| Oregon: | | | | | | | | |
| OR 3. Bayocean Spit | 85 | 34 | 122 | 49.5 | 0 | 0 | 207 | 83.5 |
| OR 7. Baker/Sutton Beaches | 260 | 105 | 0 | 0 | 0 | 0 | 260 | 105 |
| OR 8. Siltcoos to Tenmile: | | | | | | | | |
| OR 8A. Siltcoos BreachltcoosreachBreeBreach | 8 | 3 | 0 | 0 | 0 | 0 | 8 | 3 |
| OR 8B. Siltcoos River Spit to Tahkenitch Cr. Spit | 527 | 213 | 0 | 0 | 0 | 0 | 527 | 213 |
| OR 8D. Tenmile Creek Spit | 234.5 | 95 | 0 | 0 | 0 | 0 | 234.5 | 95 |
| OR 9. Coos Bay North Spit | 278 | 113 | 0 | 0 | 0 | 0 | 278 | 113 |
| OR 10A. Bandon to Floras Creek | 298 | 121 | 171 | 69 | 163 | 66 | 632 | 256 |
| Subtotal | 1690.5 | 684 | 293 | 118.5 | 163 | 66 | 2146.5 | 868.5 |
| California: | | | | | | | | |
| CA 1. Lake Earl | 0 | 0 | 11 | 5 | 46 | 19 | 57 | 24 |
| CA 2. Big Lagoon | 0 | 0 | 280 | 113 | 0 | 0 | 280 | 113 |
| CA 3. McKinleyville Area: | | | | | | | | |
| CA 3A. Clam Beach/Little River | 0 | 0 | 131 | 53 | 24 | 10 | 155 | 63 |
| CA 3B. Mad River | 0 | 0 | 161 | 65 | 217 | 88 | 377 | 153 |
| CA 4. Eel River Area: | | | | | | | | |
| CA 4A. Humboldt Bay, S. Spit | 20 | 8 | 354 | 143 | 0 | 0 | 375 | 152 |
| CA 4B. Eel River N Spit/Beach | 0 | 0 | 278 | 112 | 5 | 2 | 283 | 114 |
| CA 4C. Eel River S Spit/Beach | 0 | 0 | 4 | 2 | 397 | 161 | 402 | 163 |
| CA 4D. Eel River Gravel Bars | 0 | 0 | 255 | 103 | 938 | 379 | 1193 | 483 |
| CA 5. MacKerricher Beach | 0 | 0 | 1017 | 412 | 31 | 13 | 1048 | 424 |
| CA 6. Manchester Beach | 0 | 0 | 336 | 136 | 5 | 2 | 341 | 138 |
| CA 8. Pt. Reyes Beach | 462 | 187 | 0 | 0 | 0 | 0 | 462 | 187 |
| CA 9. Limantour Spit | 124 | 50 | 0 | 0 | 0 | 0 | 124 | 50 |
| CA 10. Half Moon Bay | 0 | 0 | 37 | 15 | 0 | 0 | 37 | 15 |

TABLE 2.—CRITICAL HABITAT UNITS DESIGNATED FOR THE PACIFIC COAST WSP—Continued

| Unit | Federal | | State/local | | Private | | Total | |
|---|---|---|---|---|---|---|---|---|
| | acres | ha | acres | ha | acres | ha | acres | ha |
| CA 11. Santa Cruz Coast: | | | | | | | | |
| CA 11A. Waddell Cr. Beach | 0 | 0 | 8 | 3 | 1 | 0.5 | 9 | 4 |
| CA 11B. Scott Cr. Beach | 0 | 0 | 0 | 0 | 19 | 8 | 19 | 8 |
| CA 11C. Wilder Cr. Beach | 0 | 0 | 10 | 4 | 0 | 0 | 10 | 4 |
| CA 12. Monterey Bay Beaches: | | | | | | | | |
| CA 12B. Elkhorn Sl Mudflat | 0 | 0 | 281 | 114 | 0 | 0 | 281 | 114 |
| CA 13. Pt.Sur Beach | 0 | 0 | 61 | 25 | 0 | 0 | 61 | 25 |
| CA 14. San Simeon Beach | 0 | 0 | 28 | 11 | 0 | 0 | 28 | 11 |
| CA 15. Estero Bay Beaches: | | | | | | | | |
| CA 15A. Villa Cr. Beach | 0 | 0 | 17 | 7 | 0 | 0 | 17 | 7 |
| CA 18. Devereux Beach | 0 | 0 | 36 | 15 | 0 | 0 | 36 | 15 |
| CA 19. Oxnard Lowlands: | | | | | | | | |
| CA 19A. Mandalay to Santa Clara R Mouth | 0 | 0 | 245 | 99 | 105 | 42 | 350 | 142 |
| CA 19B. Ormond Beach | 0 | 0 | 175 | 71 | 0 | 0 | 175 | 71 |
| CA 19D. Magu Lagoon S | 0 | 0 | 87 | 35 | 0 | 0 | 87 | 35 |
| CA 20. Zuma Beach | 0 | 0 | 60 | 24 | 8 | 3 | 68 | 28 |
| CA 21. Santa Monica Bay: | | | | | | | | |
| CA 21A. Santa Monica Beach | 0 | 0 | 6 | 2 | 19 | 8 | 25 | 10 |
| CA 21B. Dockweiler N | 0 | 0 | 43 | 17 | 0 | 0 | 43 | 17 |
| CA 21C. Dockweiler S | 0 | 0 | 13 | 5 | 11 | 5 | 24 | 10 |
| CA 21D. Hermosa Beach | 0 | 0 | 10 | 4 | 0 | 0 | 10 | 4 |
| CA 22. Bolsa Chica Area: | | | | | | | | |
| CA 22A. Bolsa Chica Reserve | 0 | 0 | 0 | 0 | 591 | 239 | 591 | 239 |
| CA 22B. Bolsa Chica St. Beach | 0 | 0 | 4 | 2 | 0 | 0 | 4 | 2 |
| CA 23. Santa Ana R Mouth | 0 | 0 | 12 | 5 | 1 | 0 | 13 | 5 |
| CA 24. San Onofre Beach | 0 | 0 | 40 | 16 | 9 | 4 | 49 | 20 |
| CA 25. Batiquitos Lagoon: | | | | | | | | |
| CA 25A. Batiquitos West | 0 | 0 | 15 | 6 | 6 | 3 | 21 | 9 |
| CA 25B. Batiquitos Middle | 0 | 0 | 15 | 6 | 8 | 3 | 23 | 9 |
| CA 25C. Batiquitos East | 0 | 0 | 0 | 0 | 21 | 8 | 21 | 8 |
| CA 26. Los Penasquitos | 0 | 0 | 24 | 10 | 0 | 0 | 24 | 10 |
| CA 27. S. San Diego: | | | | | | | | |
| CA 27B. North Island | | | 44 | 18 | | | 44 | 18 |
| CA 27E. Sweetwater NWR | 77 | 31 | 0 | 0 | 51 | 21 | 128 | 52 |
| CA 27F. Tijuana R. Beach | 105 | 42 | 77 | 31 | 0 | 0 | 182 | 73 |
| Subtotal | 788 | 318 | 4175 | 1689 | 2508 | 1018.5 | 7477 | 3029 |
| Total | 2478.5 | 1002 | 6474 | 2620.5 | 3191 | 1294.5 | 12145 | 4921 |

We present brief descriptions of all of the units, and reasons why they are essential for the conservation of Pacific Coast WSP. The critical habitat features essential for the conservation of the Pacific Coast WSP are defined in the ''Primary Constituent Elements'' section above. All units are located within the range of the population, in the States of Washington, Oregon, and California. They are all considered currently occupied (with documented use by plovers since 2000), unless otherwise noted. Those units not currently occupied are considered essential to the conservation of the population for the reasons provided in the description.

*Washington*

WA 2, Damon Point/Oyhut Wildlife Area, 908 ac (368 ha): This unit is located at the southern end of the community of Ocean Shores and is a sandy spit that extends into Grays Harbor. Damon Point includes the following features essential to the conservation of the species: sandy beaches that are relatively undisturbed by human or tidal activity (nesting habitat), large expanses of sparsely vegetated barren terrain, and mudflats and sheltered bays that provide ample foraging areas. Research in the mid 1980's indicated that up to 20 snowy plovers used the area for nesting. Plover use has declined somewhat over the past 20 years; currently between 6 and 9 adult birds use the site during the breeding season (average reproductive success at Damon is 1.5 chicks per male) (WDFW *in litt.* 2003). The conservation goal for WA 2 is 12 adult plovers. Approximately 99 percent of the 908-acre unit is administered by the State (Washington Department of Fish and Wildlife—227 ac (92 ha); Washington State Parks—63.6 ac (25.7 ha); and Washington Department of Natural Resources—605.6 ac (245.1 ha)). The western edge of the unit lies adjacent to a municipal wastewater treatment facility that is managed by the City of Ocean Shores (9 ac (3.6 ha)). The access road has washed out and the area is currently inaccessible to motorized vehicles. Management may be needed to address threats to plovers from recreational use (pedestrians with dogs), habitat loss from European beachgrass, and potential re-opening of the vehicle access road.

WA 3, Midway Beach, 786 ac (318 ha): This unit is located between the community of Grayland and Willapa Bay and covers an area called Twin Harbors Beaches. Midway is an expansive beach and is nearly 0.5 mi (0.8 km) wide at the widest point. Beach accretion since 1998 has greatly improved habitat conditions, resulting in the re-establishment of a plover population at this site (WDFW *in litt.*

2000). Nearly half of the birds that nest and/or over-winter at Midway were banded in Oregon or Humboldt County, California (WDFW *in litt.* 2003). Threats at Midway include motorized vehicles combined with a lack of enforcement of the wet sand driving restrictions and human activity on holiday weekends (*e.g.*, Fourth of July fireworks). Although public access is restricted on private property, beach driving is permitted below MHW. Approximately ⅔ (about 520 ac (210.4 ha)) of this unit is on private property with the remainder (266 ac (107.6 ha)) on State park lands. Private property rights extend to the mean low water line (MLW) in Washington State. The conservation goal for Midway Beach is 30 adult breeding birds. Twenty-eight plovers nested at this site during the 2003 breeding season, and the site has shown a relatively high average annual production of 1.3 to 1.9 chicks per male (WDFW *in litt.* 2003).

WA 4. Leadbetter Point/Gunpowder Sands, 832 ac (337 ha): The Leadbetter Point/Gunpowder Sands critical habitat unit is located at the northern end of the Long Beach Peninsula, a 26-mile (41.8-km) long spit that defines the west side of Willapa Bay and extends down to the mouth of the Columbia River. The unit is located just north of the community of Ocean Park. The portion of the spit within the Willapa National Wildlife Refuge has not been included in the final critical habitat designation under subsection 3(5)(a) of the Act, based on its existing management. As a result of Refuge exclusion, the unit size has decreased from 1,069 acres (433 ha) to its current 832 acres (337 ha). The southern portion of the unit, including Leadbetter Point State Park and the beach south of the state park boundary, is managed by the Washington State Parks and Recreation Department. State regulations, including motorized vehicle access during special shellfish seasons and recreational use, apply to the portion of the beach that is managed by the State. South of the Willapa NWR boundary, the state park jurisdiction follows an 1880 property line that extends well above the mean high tide line and includes all of the snowy plover nesting and foraging habitat in that part of the unit.

Leadbetter is the largest of the critical habitat units in Washington and covers approximately 832 acres (337 ha) over 7 miles (11.3 km) of coastline. The entire unit is on lands that are managed by Washington State. Approximately 30 snowy plovers nest and over-winter on the spit, with about 20–25 birds nesting north of the refuge boundary and 5–10 birds using the state park beaches to the south (Service *in litt.* 2004). Plover use of the beaches south of the refuge boundary appears to be increasing. The unit includes PCEs such as: sandy beaches and sparsely vegetated dunes for nesting as well as miles of surf-cast organic debris and sheltered bays for foraging. The combined dynamics of weather and surf cause large quantities of wood and shell material to accumulate on the spit, providing prime nesting habitat, hiding areas from predators, foraging opportunities, and shelter from inclement weather for plover broods. The plover population at Leadbetter has been slowly increasing since intensive monitoring began in 1993 and we consider the area capable of supporting at least 30 breeding plovers given appropriate management.

The primary threat north of the refuge boundary is human disturbance during the spring razor clam season, which opens beaches to motorized vehicle and provides access into plover nesting areas that normally receive limited human use. Beaches south of the refuge are open to public use year round. The State Parks department has posted interpretive signs in areas being used by plovers and is increasing enforcement of the wet sand driving regulations.

*Oregon*

OR 3, Bayocean Spit, 207 ac (84 ha): This unit is on the western coast of Tillamook County, Oregon, and about 8 mi (12.9 km) northwest of the City of Tillamook. It is bounded by Tillamook Bay on the east, the Tillamook Bay South Jetty to the north, and the Pacific Ocean to the west. The unit is characteristic of a dune-backed beach in close proximity to mud flats and an estuary. It includes the following features essential to the conservation of the species (PCEs): large areas of sandy dune relatively undisturbed by human or tidal activity (for nesting and foraging); areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for foraging); and close proximity to tidally influenced estuarine mud flats (for foraging). Two breeding plovers and one wintering plover were documented in this unit in 1993 and 2000, respectively (ODFW *in litt. 1994; Service in litt.* 2004). This unit provides habitat capable of supporting 16 breeding plovers under proper management. The unit consists of 85 ac (34.4 ha) of federally owned land and 122 ac (49.4 ha) of county-owned land. The primary threats that may require special management in this unit are introduced European beachgrass that encroaches on the available nesting and foraging habitat; disturbance from humans, dogs and horses in important foraging and nesting areas; and predators such as the common raven.

OR 7, Sutton/Baker Beaches, 260 ac (105.2 ha): This unit is on the western coast of Lane County, Oregon, about 8 mi (12.9 km) north of the City of Florence. It is bounded by Sutton Creek to the south, Heceta Head to the north, and the Pacific Ocean to the west. The unit is characteristic of a dune-backed beach and wide sand spits with overwash areas. It includes the following features essential to the conservation of the species: large areas of sandy dunes or sand spit overwashes relatively undisturbed by human or tidal activity (for nesting and foraging) and areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for foraging). Most recently documented plovers for this unit include an average of 2 breeding plovers in 2003 and 8 wintering plovers in 2004 (Lauten *et al. in litt.* 2003; Service *in litt.* 2004). This unit is capable of supporting 12 breeding plovers under proper management. The unit consists of 260 federally owned ac (105.2 ha) managed by the U.S. Forest Service in Siuslaw National Forest. The primary threats that may require special management in this unit are introduced European beachgrass that encroaches on the available nesting and foraging habitat; disturbance from humans, dogs and horses in important foraging and nesting areas; and predators such as the American crow and common raven.

Unit OR 8, Siltcoos to Tahkenitch Creek Spit: This unit includes two subunits within Lane and Douglas counties, Oregon.

Subunit OR 8A, Siltcoos Breach, 8 ac (3 ha): This subunit is on the southwestern coast of Lane County, Oregon, about 7 mi (11.3 km) southwest of the City of Florence. It is a large opening in the foredune just north of the Siltcoos River and is an important winter roost. The subunit is characteristic of a dune-backed beach in close proximity to a tidally influenced river mouth. It includes the following features essential to the conservation of the species: Sparsely vegetated areas of sandy dune relatively undisturbed by human or tidal activity (for roosting); areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for foraging); and close proximity to tidally influenced freshwater areas (for foraging). Recently documented plovers for this subunit include 20 wintering plovers in 2004 (Service *in litt.* 2004). The subunit consists of 8 federally owned acres (3.4

ha) managed by the U.S. Forest Service as the Oregon Dunes National Recreation Area in the Siuslaw National Forest. The primary threats that may require special management in this subunit are introduced European beachgrass that encroaches on the available roosting habitat and disturbance from OHVs in the important roosting areas.

Subunit OR 8B, Siltcoos River to Tahkenitch Creek Spit, 527 ac (213 ha): The northern end of this subunit is on the southwestern coast of Lane County, Oregon, about 7 mi (11.3 km) southwest of the City of Florence. The southern end is on the northwestern coast of Douglas County, Oregon, about 10 mi (16.1 km) northwest of the City of Reedsport. It is bounded by the Siltcoos River to the north, Tahkenitch Creek to the south and the Pacific Ocean to the west. The subunit is characteristic of a dune-backed beach and sand spit in close proximity to a tidally influenced river mouth. It includes the following features essential to the conservation of the species: Wide sand spits or wash overs and sparsely vegetated areas of sandy dune relatively undisturbed by human or tidal activity (for nesting and foraging); areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for foraging); and close proximity to tidally influenced freshwater areas (for foraging). Recently documented plovers for this subunit include an average of seven breeding plovers in 2003 and two wintering plovers in 2003 (Lauten *et al. in litt.* 2003; Service *in litt.* 2004). This subunit is capable of supporting 20 breeding plovers under proper management. The subunit consists of 527 federally owned acres (213.3 ha) managed by the U.S. Forest Service as the Oregon Dunes National Recreation Area in the Siuslaw National Forest. The primary threats that may require special management in this subunit are introduced European beachgrass that encroaches on the available nesting and foraging habitat; disturbance from humans, dogs and OHVs in important foraging and nesting areas; and predators such as the American crow and common raven.

OR 9, Coos Bay North Spit, 278 ac (112.5 ha): This unit is on the western coast of Coos County, Oregon, about 5 mi (8.0 km) west of the City of Coos Bay. It is bounded by Coos Bay to the east, the Coos Bay North Jetty to the south, and the Pacific Ocean to the west. The unit is characteristic of a dune-backed beach and interior interdune flats created through dredge material disposal or through habitat restoration. It includes the following features essential to the conservation of the species (PCEs): Expansive sparsely vegetated interdune flats (for nesting and foraging); areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging); and close proximity to tidally influenced estuarine areas (for foraging). The most recently documented plovers for this unit include an average of 17 breeding and 3 wintering plovers in 2003 (Lauten *et al. in litt.* 2003; Service *in litt.* 2004). This unit provides habitat capable of supporting 54 breeding plovers under proper management. The unit consists of 278 federally owned acres (112.5 ha) primarily managed by the Bureau of Land Management. Threats that may require special management in this unit are introduced European beachgrass that encroaches on the available nesting and foraging habitat; disturbance from humans, dogs and OHVs in important foraging and nesting areas; and predators such as the American crow and common raven.

OR 10, Bandon/Cape Blanco Area: One subunit within this unit was identified as essential to the conservation of the species, near the town of Bandon in Coos and Curry Counties, Oregon.

Subunit OR 10A, Bandon to Floras Lake, 632 ac (256 ha): This subunit is on the southwestern coast of Coos County, Oregon, about 4 mi (6.4 km) south of the City of Bandon. It is bounded by China Creek to the north, the New River to the east, Floras Lake to the south, and the Pacific Ocean to the west. The subunit is characteristic of a dune-backed beach and barrier spit. It includes the following features essential to the conservation of the species: Wide sand spits or washovers and sparsely vegetated areas of sandy dune relatively undisturbed by human or tidal activity (for nesting and foraging); areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (foraging); and close proximity to tidally influenced freshwater areas (for foraging). The most recently documented plovers for this subunit include an average of 15 breeding and 18 wintering plovers in 2003 (Lauten *et al. in litt.* 2003; Service *in litt.* 2004). This subunit is capable of supporting 54 breeding plovers under proper management. The subunit consists of 298 ac (120 ha) of federally owned land, 171 ac (69 ha) of State-owned land, 12 ac of county-owned land (5 ha), and 163 ac (66 ha) of privately owned land. The Bureau of Land Management and the Oregon Parks and Recreation Department are the unit's primary land managers. Threats that may require special management in this subunit are introduced European beachgrass that encroaches on the available nesting and foraging habitat; disturbance from humans, dogs, horses and OHVs in important foraging and nesting areas; and predators such as the common raven and red fox.

*California*

Unit CA 1, Lake Earl; 57 ac (24 ha): This unit is located directly west of the Lake Earl/Lake Tolowa lagoon system. The portion of the proposed unit extending north to Kellogg Road has been dropped from the final critical habitat designation, reducing the size of the unit from 91 acres (37 ha) to the designated 57 acres (24 ha). The narrow portion of the proposed unit that extended along the Pacific Shores housing development was removed from the final rule because of information received regarding the dense stands of non-native European beachgrass along an already narrow beach, the relatively steep slope of the beachfront, and intensive use by OHVs. These factors combined make the northern portion of the proposed unit non-essential habitat. As a consequence, the final designated unit extends slightly to the south on to State Park property, while avoiding the private property to the north.

The Lake Earl lagoon is approximately 3 mi (4.8 km) in length, encompasses 90.8 ac (36.7 ha), and lies approximately 2 mi (3.2 km) north of Point Saint George and the McNamara Airfield. Essential features of the unit for Pacific Coast WSP conservation include sandy beaches above and below the mean high tide line, wind-blown sand in dune systems immediately inland of the active beach face, and the wash over area at the lagoon mouth. The Lake Earl unit is a historical breeding site, and has harbored a small population of wintering plovers in recent years (Watkins, pers. comm. 2004). We expect this unit is capable of supporting 10 breeding plovers with adaptive management. All 57 ac (24 ha) are managed by the State under the jurisdiction of the California Department of Fish and Game, and California State Parks. Threats to the species include the following: Degradation of the sand dune system due to encroachment of European beachgrass; destruction of habitat and loss of wintering and nesting plovers from OHV use; and, destruction of habitat from annual mechanical breaching (as authorized by the U.S. Army Corp of Engineers (ACOE)) of the Lake Earl/Lake Tolowa lagoon.

Monitoring indicates that the practice of breaching has only temporary, short-term effects to wintering plovers.

CA 2, Big Lagoon, 280 ac (113 ha): This unit consists of a large sand spit that divides the Pacific Ocean from Big Lagoon. The northern extent of the Big Lagoon spit is approximately three mi (4.8 km) south of the Town of Orick. The unit contains the following features essential to the conservation of the Pacific Coast WSP (PCEs): Low lying sandy dunes and open sandy areas that are relatively undisturbed by humans; and sandy beach above and below the high tide line that supports small invertebrates. The Big Lagoon spit is historical nesting habitat, and currently maintains a winter population of fewer than 10 plovers (Watkins, pers. comm. 2001). We estimate the unit can support 16 breeding plovers. The unit is located on the spit, which is approximately 3.8 mi (6.1 km) in length. Most of the unit (279.2 ac, 113.0 ha) is managed by the California Department of Parks and Recreation (CA State Parks). An additional 0.6 ac (0.26 ha) are Humboldt County-managed. State Parks has conducted habitat restoration at this unit through the hand-removal of non-native vegetation. The primary threat to wintering and breeding plovers that may require special management is the disturbance from humans and dogs walking through winter flocks and potential nesting areas.

CA 3, McKinleyville Area: This unit consists of two subunits in the vicinity of McKinleyville, California, in Humboldt County.

CA 3A, Clam Beach/Little River, 155 ac (63 ha): The Little River/Clam Beach subunit's northern boundary is directly across from the south abutment of the U.S. Highway 101 bridge that crosses the Little River. The southern subunit boundary is aligned with the north end of the southernmost, paved Clam Beach parking area. The length of the unit is approximately 1.8 mi (2.8 km). Essential features of the subunit that contribute towards the conservation of the Pacific Coast WSP include large areas of sandy dunes, areas of sandy beach above and below the high tide line, and generally barren to sparsely vegetated terrain. The subunit currently supports a breeding population of approximately 12 plovers, and a winter population of up to 55 plovers (Colwell, *et al.* 2003). It has developed into one of four primary nesting locations within northern California. We expect the subunit to be capable of supporting six pairs of breeding plovers. The primary threats to nests, chicks, and both wintering and breeding adult plovers in this subunit are OHV use, predators, and disturbance caused by humans and dogs. Of the total 154.9 ac (62.7 ha), approximately 81.5 acres (33 ha) are under the jurisdiction of the CA State Parks, 24.1 acres (9.8 ha) are in private ownership, and 49.5 acres (20 ha) are under the ownership and management of Humboldt County.

CA 3B, Mad River Beach, 377 ac (153 ha): This subunit was largely swept clean of European beachgrass when the Mad River temporarily shifted north in the 1980's and 1990's. The Mad River Beach subunit is approximately 2.8 mi (4.5 km) long, and ranges from the U.S. Highway 101 Vista Point below the Arcata Airport in the north, to School Road in the south. One hundred sixty one acres (65 ha) are owned and managed by Humboldt County, and 216.5 (87.6 ha) are privately owned. Essential features of the subunit that contribute towards the conservation of the Pacific Coast WSP include large areas of sandy dunes, areas of sandy beach above and below the high tide line, and generally barren to sparsely vegetated terrain. We expect the subunit to eventually support 12 breeding plovers with proper management. The current breeding population is believed to be less than 5 plovers, although plovers from this subunit readily intermix with plovers in CA 3A (Colwell, *et al.* 2003). Occasional winter use by plovers has been intermittently documented, with most wintering within the adjacent critical habitat unit to the north (Hall, pers. comm. 2003). The primary threats to nests, chicks, and both wintering and breeding adult plovers are OHV use, and disturbance caused by equestrians and humans with accompanying dogs.

Unit CA 4, Eel River Area: This unit consists of 4 subunits, 1 each on the north and south spits of the mouth of the Eel River, 1 for the Eel River gravel bars supporting nesting plovers approximately 5 to 10 mi (3 to 6 km) inland, and 1 extending from the south spit of Humboldt Bay to the beach adjacent to the north Eel River spit subunit.

Subunit CA 4A, Humboldt Bay, South Spit Beach, 375 ac (152 ha): This subunit is located across Humboldt Bay, less than one mile (<1.6 km) west of the City of Eureka, with the southern boundary being Table Bluff. Three hundred forty-four acres (139.3 ha) of the unit are owned by the California Department of Fish and Game, but are managed by the Federal Bureau of Land Management, 10.1 ac (4.1 ha) are owned and managed by the County of Humboldt, and 20.2 ac (8.2 ha) are owned by the U.S. Army Corps of Engineers. The subunit is 4.8 mi (7.7 km) in total length. The following features essential to the conservation of the Pacific Coast WSP can be found within the unit: Large areas of sandy dunes, areas of sandy beach above and below the high tide line, and generally barren to sparsely vegetated terrain. The plover wintering population is estimated at under 15 individuals, and three nests, from 4 breeders, were attempted within the subunit in 2003 (Colwell, *et al.* 2003). This subunit is capable of supporting 30 breeding plovers. The Bureau of Land Management has conducted habitat restoration within the subunit, in consultation with us. The primary threats to adult plovers, chicks, and nests, are OHV use, and disturbance from equestrians and humans with dogs.

Subunit CA 4B, Eel River North Spit and Beach, 283 ac (114 ha): This subunit stretches from Table Bluff on the north to the mouth of the Eel River in the south. The subunit is estimated to be 3.9 miles (6.3 km) long, and is managed by the California Department of Fish and Game, except for five acres of private land. Essential features of the unit include: Large areas of sandy, sparsely vegetated dunes for reproduction and foraging, and areas of sandy beach above and below the high tide line supporting small invertebrates for foraging. Driftwood is an important component of the habitat in this subunit, providing shelter from the wind both for nesting plovers and for invertebrate prey species. The subunit's winter population of plovers is estimated at less than 20 (LeValley, 2004). As many as 11 breeders have been observed during breeding season window surveys, with a breeding population estimated at less than 15 (Colwell, *et al.* 2003). We expect this subunit to eventually support 20 breeding plovers with proper management. Threats include predators, OHVs, and disturbance from equestrians and humans with dogs.

Subunit CA 4C, Eel River South Spit and Beach, 402 ac (163 ha): This subunit encompasses the beach segment from the mouth of the Eel River, south to Centerville Road, approximately 4 miles (6.4 km) west of the Town of Ferndale. The subunit is 5 miles (8.3 km) long. 397.1 acres (160.7 ha) are private, and the remaining 4.4 ac (1.8 ha) are managed by Humboldt County. Essential features of the subunit include: Large areas of sandy dunes, areas of sandy beach above and below the high tide line, and generally barren to sparsely vegetated terrain. This subunit is capable of supporting 20 breeding plovers. A single nest was found during the 2004 breeding season (McAllister, pers. comm. 2004). The

winter population is estimated at under 80 plovers, many of which breed on the Eel River gravel bars (CA 5) (McAllister, pers. comm. 2003, Transou, pers. comm. 2003). Threats include predators, OHVs, and disturbance from equestrians and humans with dogs.

Subunit CA 4D, Eel River Gravel Bars; 1,190 ac (481 ha): The overall acreage of this unit has changed from the proposed 1,193 ac (483 ha) due to information received regarding the inclusion of developed properties managed by the California Department of Transportation. The 3 acres containing road developments have been dropped from the final designation, and is considered a mapping error.

This subunit is inundated during winter months due to high flows in the Eel River. It is 6.4 mi (10.3 km) from the Town of Fernbridge, upstream to the confluence of the Van Duzen River. The Eel River is contained by levees in this section, and consists of gravel bars and wooded islands. The subunit contains a total of 1,190 ac (481 ha), of which 176 ac (71) are owned and managed by Humboldt County, 76 ac (30 ha) are under the jurisdiction of the California State Lands Commission, and 938 ac (379 ha) are privately owned. Essential features of this subunit include bare, open gravel bars comprised of both sand and cobble which support reproduction and foraging. This Subunit harbors the most important breeding habitat in California north of San Francisco Bay, having the highest fledging success rate of any area from Mendocino County to the Oregon border. This subunit is capable of supporting 40 breeding plovers. Recent window surveys documented 22 breeding birds in this subunit (LeValley, pers. comm. 2004). Threats include predators, OHVs, and disturbance from gravel mining and humans with dogs.

CA 5, MacKerricher Beach, 1,048 ac (424 ha): This unit is approximately 3.5 miles (5.5 km) long. The unit is just south of the Ten Mile River, and approximately 4 miles (6.4 km) north of the City of Fort Bragg. 1,017.2 acres (411.6 ha) are managed by CA State Parks, and 31.2 acres (12.6 ha) are private. Essential features of the unit include: Large areas of sandy dunes, areas of sandy beach above and below the high tide line, and generally barren to sparsely vegetated terrain. State Parks has been conducting removal of European beachgrass to improve habitat for the Pacific Coast WSP and other sensitive dune species within the unit. This unit is capable of supporting 20 breeding plovers. The current breeding population is estimated at less than 10 (Colwell, *et al.* 2003). The winter population of plovers is under 45 (Cebula, pers. comm. 2004). Threats to nests, chicks and both wintering and breeding adults include predators and disturbance from equestrians and humans with dogs.

CA 6, Manchester Beach, 341 ac (138 ha): The Manchester Beach unit is approximately 3.5 miles (5.7 km) in length. California State Parks manages 336.2 ac (136.1 ha) of the unit, while the remaining 4.8 ac (1.9 ha) are private. Essential features of the unit include: Large areas of sandy dunes, areas of sandy beach above and below the high tide line, and generally barren to sparsely vegetated terrain. This unit provides an important wintering site for the region (Service 2001). In 2003, a pair of plovers nested within the unit, and successfully hatched 2 chicks. However, those chicks did not survive (Colwell, *et al.* 2003). The current wintering population is estimated at less than 20 (Cebula, pers. comm. 2004). Threats to nests, chicks and both wintering and breeding adults include predators and disturbance from equestrians and humans with dogs.

CA 7, Dillon Beach, 30 ac (12 ha): This unit was excluded from critical habitat designation under section 4(b)(2) of the Act, primarily based upon the landowner's willingness to enter a partnership ensure conservation (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). This unit is located at the mouth of Tomales Bay, just south of the town of Dillon Beach. It stretches for about 1.25 mi (2.01 km) north from Sand Point. PCEs provided by the unit include surf-cast debris supporting small invertebrates for foraging, and large stretches of relatively undisturbed, sparsely vegetated sandy beach, both above and below high tide line, for foraging and potentially for nesting. Although nesting has not been noted here, the unit is an important wintering area. One hundred twenty three wintering plovers were counted at this spot during the last winter survey in January 2004 (Page *in litt.* 2004). Other than State lands intermittently exposed below mean high tide, the unit is entirely on private land. Potential threats that may require special management include predators and disturbance by humans and their pets.

CA 8, Pt. Reyes Beach, 462 ac (187 ha): This unit occupies most of the west-facing beach between Point Reyes and Tomales Point. It is located entirely within the Point Reyes National Seashore, and consists primarily of dune backed beaches. The unit includes the following PCEs essential to plover conservation: Sparsely vegetated sandy beach above and below high tide for nesting and foraging, wind-blown sand dunes for nesting and predator avoidance, and tide-cast debris attracting small invertebrates for foraging. It supports both nesting and wintering plovers, and can support 50 breeding birds with proper management. Threats in the area that may require special management include disturbance by humans and pets, and predators (particularly ravens and crows).

CA 9, Limantour Spit, 124 ac (50 ha): Limantour Spit is a roughly 2.25 mile (4.0 km) sand spit at the north end of Drake's Bay. The unit includes the end of the spit, and contracts to include only the south-facing beach towards the base of the spit. It is completely within the Point Reyes National Seashore. CA 9 can support both nesting and wintering plovers, although nesting has not been documented since 2000 (Page *in litt.* 2003, 2004). Ninety-five wintering plovers were counted at the site during the January 2004 survey (Page *in litt.* 2004). The unit is expected to contribute significantly to plover conservation in the region by providing habitat capable of supporting ten nesting birds. PCEs at the unit include sparsely vegetated beach sand, above and below high tide for nesting and foraging, and tide-cast debris supporting small invertebrates. Threats that may require special management include disturbance by humans and pets, and nest predators such as crows and ravens.

CA 10, Half Moon Bay, 37 ac (15 ha): This unit stretches for about 1.25 mi (2.01 km) along Half Moon Bay State Beach, and is entirely within California State Park land. It includes sandy beach above and below the high tide line for nesting and foraging, and surf-cast debris to attract small invertebrates. Small numbers of breeding birds have been found at the location in the past three surveys, including four breeding birds in the most recent survey, conducted in 2003 (Page *in litt.* 2003). The unit also supports a sizeable winter flock, consisting of 65 birds in 2004 (Page *in litt.* 2004). We expect the unit to eventually support ten breeding birds in the unit under proper management, which makes it a potentially significant contributor to plover conservation. Potential threats in the area that may require special management include disturbance by humans and pets, and nest predators.

CA 11, Santa Cruz Coast: This unit consists of three relatively small pocket beaches in Santa Cruz County, California. The unit forms an important link between larger breeding beeches to

the north and south, such as Half Moon Bay and the Monterey Bay beaches.

Subunit CA 11A, Waddell Creek Beach, 9 ac (4 ha): This subunit includes the mouth of Waddell Creek and is located about 20 mi (32.2 km) north of the city of Santa Cruz. It extends about 0.7 mi (1.1 km) north along the coast from a point about 0.1 mi (0.2 km) south of the creek mouth to a point about 0.6 mi (0.4 km) north of the creek. This unit was listed as being unoccupied in the proposed rule in error. From 3 to 11 nesting plovers were counted in this unit in the early 1990's, and the area also supported a sizeable wintering plover population of up to 50 birds during that time (Service 1991). More recently, at least one nest successfully hatched in 2004 and one in 2005 (G. Page, Point Reyes Bird Observatory, pers. comm. 2005). The area provides several essential habitat features, including wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). With proper management, and in conjunction with the other two small units proposed for Santa Cruz County (CA 11B and 11C), this subunit can attract additional nesting plovers and thereby facilitate genetic interchange between the larger units at Half Moon Bay (CA 10) and Palm Beach and Moss Landing (CA 12) (see Criterion 3, Methods section, above). CA 11A encompasses approximately 8.1 ac (3.3 ha) of State land and 1.3 ac (0.5 ha) of private land. Human disturbance is the primary threat to plovers in the subunit that might require special management.

Subunit CA 11B, Scott Creek Beach, 19 ac (8 ha): This subunit includes the mouths of Scott and Molino creeks and is located about 13 mi (20.9 km) north of the city of Santa Cruz. It extends about 0.7 mi (1.1 km) north along the coast from the southern end of the sandy beach (0.3 mi (0.5 km) south of Molino Creek) to a point about 0.1 mi (0.4 km) north of Scott Creek. Recent surveys have found from 12 (in 2000) to 1 (in 2004) nesting plovers occupying the area (Page *in litt.* 2004), and it is an important snowy plover wintering area, with up to 114 birds each winter (Page *in litt.* 2004). This subunit is essential to the conservation of the species because with proper management, and in conjunction with the other two small units proposed for Santa Cruz County (CA 11B and 11C), it can attract additional nesting plovers and thereby facilitate genetic interchange between the larger units at Half Moon Bay (CA 10) and Palm Beach and Moss Landing (CA 12) (see Criterion 3, Methods section, above). The subunit includes the following habitat features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). CA 13 is situated entirely on private land. Human disturbance and predators are the primary threats to snowy plovers in this subunit that may require special management.

Subunit CA 11C, Wilder Creek Beach, 10 ac (4 ha): This subunit is located at the mouth of Laguna Creek and is about 8 mi (12.9 km) north of the city of Santa Cruz. It extends about 0.5 mi (0.3 km) north along the coast from the southern end of the sandy beach to the northern end of the beach across the mouth of Laguna Creek. Five nesting plovers were found in the area in 2000 (Page *in litt.* 2004). The subunit includes the following essential features: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). CA 11C is capable of supporting sixteen breeding birds under proper management. The subunit is entirely situated on State-owned land. Disturbance from humans and pets, development, OHV use, pets, and predators are the primary threats to snowy plovers in this subunit that may require special management.

CA 12, Monterey Bay Beaches: This unit now includes one subunit within Monterey Bay, California, in parts of Santa Cruz and Monterey Counties.

Subunit CA 12A, Jetty Rd to Aptos, 272 ac (110 ha): This subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs *(see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act).* This subunit is about 5 mi (8 km) west of the city of Watsonville and includes Sunset and Zmudowski State beaches. The mouth of the Pajaro River is located near the center of the unit, and Elkhorn Slough is at the south end of the unit. It extends about 8.5 mi (13.7 km) north along the coast from Elkhorn Slough to Zils Road. This is an important snowy plover nesting area, with 8–38 birds nesting each year, and is also an important wintering area, with up to 250 birds each winter (Page *in litt.* 2004)). This subunit is capable of supporting 54 breeding birds under proper management. It includes the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). CA 12A exists entirely on State lands. Human disturbance, development, horses, OHV use, pets, predators, and dune-stabilizing vegetation such as European beachgrass are the primary threats to snowy plovers in this subunit that may require special management.

Subunit CA 12B, Elkhorn Slough Mudflats, 281 ac (114 ha): CA 12B is about 3.5 mi (5.6 km) north of the city of Castroville along the north side of Elkhorn Slough east of Highway 1. It extends about 1 mi (1.6 km) along the north shore of Elkhorn Slough east of Highway 1 and about 0.5 mi (0.8 km) north from Elkhorn Slough to Bennett Slough. This is an important nesting area, with 6–47 birds nesting each year, and is also an important wintering area, with up to 95 birds each winter (Page *in litt.* 2004, Stenzel *in litt.* 2004). This subunit is capable of supporting 80 breeding birds under proper management. It includes the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). The subunit is situated entirely on State-owned land. Human disturbance, development, horses, OHV use, pets, predators, and vegetation are the primary threats to snowy plovers in this subunit that may require special management.

Subunit CA 12C, Monterey to Moss Landing, 788 ac (319 ha): This subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). This subunit includes the beaches along the southern half of Monterey Bay from the city of Monterey at the south end of the subunit to Moss Landing and the mouth of Elkhorn Slough at the north end of the unit. The mouth of the Salinas River is located near the center of the unit. It extends about 15 mi (24.2 km) north along the coast from Monterey to Moss Landing. This is an important nesting area, with 61 to 104 nesting birds each year, and is also an

important snowy plover wintering area, with up to 190 birds each winter (Page *in litt.* 2004, Stenzel *in litt.* 2004). This subunit is capable of supporting 162 breeding birds under proper management. It includes the following habitat features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). CA 12C includes approximately 470 ac (190 ha) of State and local lands, and 63 ac (25 ha) of Federal land. It would include an additional 142 ac (57.5 ha) of Federal land in the Salinas River National Wildlife Refuge, but we are excluding that area based on the existence of a Comprehensive Conservation Plan for Salinas River NWR that has undergone section 7 consultation (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). Human disturbance, development, horses, OHV use, pets, predators, and habitat changes resulting from exotic vegetation are the primary threats to snowy plovers in this subunit that may require special management.

CA 13, Point Sur Beach, 61 ac (25 ha): This unit is about 17 mi (27.4 km) south of the city of Monterey and immediately north of Point Sur. It extends about 1 mi (1.6 km) north along the coast from Point Sur. This is an important snowy plover wintering area, with up to 65 birds each winter (Page *in litt.* 2004). A few nesting pairs (1–2) also occupy this unit each year (Stenzel *in litt.* 2004). This unit is capable of supporting 20 breeding birds under proper management. It includes the following features essential to the species: Wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). This unit is situated entirely on State-owned land. Human disturbance and habitat changes due to exotic vegetation are the primary threats to snowy plovers in this unit that may require special management.

CA 14, San Simeon Beach, 28 ac (11 ha): CA 14, which is entirely within San Simeon State Beach, is located about 5 mi (8 km) south of San Simeon. It extends about 0.9 mi (1.5 km) north along the coast from a point opposite the intersection of Highway 1 and Moonstone Beach Drive to the northwestern corner of San Simeon State Beach. This is an important snowy plover wintering area, supporting 143 birds as documented by the most recent winter survey (Page *in litt.* 2004). The unit also supports a small number of nesting plovers: One nest hatched three chicks in 2002, and one nest was initiated but lost to predators in 2003 (Orr *in litt.* 2004). This unit includes the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Human disturbance, pets, and dune stabilizing vegetation are the primary threats to snowy plovers in this unit that may require special management.

CA 15, Estero Bay Beaches: This unit now includes one subunit in Estero Bay, California, San Luis Obispo County. The subunit designated as critical habitat (CA 15A) is a pocket beach at the north end of the bay.

Subunit CA 15A, Villa Creek Beach, 17 ac (7 ha): The Villa Creek subunit is about 3.5 mi (5.6 km) northwest of the city of Cayucos, and is managed by the California Department of Parks and Recreation. Villa Creek Beach is located near the northern boundary of the Estero Bluffs property. It extends 0.3 mi (0.5 km) northwest along the beach from an unnamed headland 1.4 mi (2.3 km) north of Point Cayucos to an unnamed headland northwest of Villa Creek, and inland (north) for 0.25 mi (0.4 km) along Villa Creek. This subunit is an important breeding area that supports between 21 and 38 adults during the breeding season, and up to 31 nests (Larson 2003a). This area is also an important wintering site that supports up to 30 wintering birds (George 2001). It includes the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Threats that may require special management include human disturbance, pets, horses, and predators.

Subunit CA 15B, Atascadero Beach, 101 ac (40 ha): This subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). A 43-ac (17 ha) portion of this subunit from Highway 41/Atascadero Road south to Morro Bay Rock was removed as not essential to the conservation of the plover. This area is heavily disturbed by recreational beach users and does not provide the features essential for the conservation of the species (*e.g.*, an area free from disturbance) and is not, by definition, critical habitat. However, the remainder of subunit 15B was determined to be essential for western snowy plover conservation.

The subunit is located at Morro Strand State Beach near the city of Morro Bay, and is managed entirely by the California Department of Parks and Recreation. It extends about 1.6 mi (2.5 km) north along the beach from Atascadero Road/Highway 41 to an unnamed rocky outcrop opposite the end of Yerba Buena Street at the north end of Morro Bay. This is an important breeding area supporting up to 40 nests each year (Larson 2003b). CA 15B is also an important wintering area, with up to 152 wintering birds (Service 2001). This subunit is essential to species conservation because it contributes significantly to the regional conservation goal by providing habitat capable of supporting 40 breeding birds under proper management (Service 2001). It includes the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Human disturbance, pets, and predators are the primary threats to plovers in this unit that may require special management.

Subunit CA 15C, Morro Bay Beach, 611 ac (247 ha): This subunit was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). The subunit is located at Morro Bay near Morro Rock. The majority of the beach is managed by the California Department of Parks and Recreation, while the northern tip of the sand spit is owned by the city of Morro Bay. It extends 6.9 miles (11.1 km) north along the beach from a rocky outcrop about 0.2 mi (0.3 km) north of Hazard Canyon to the northern tip of the sand spit. This is an important breeding and wintering area that supports more than 100 breeding adults and up to 148 wintering birds (Page *in litt.* 2003). This subunit is capable of supporting 110 breeding birds under proper management. It includes the following features essential to the species: Wind-blown sand dunes, areas of above and below the high tide line with occasional surf-cast wrack

supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Human disturbance, horses, pets, predators, and dune-stabilizing vegetation are the primary threats to plovers that may require special management.

CA 16, Pismo Beach/Nipomo Dunes, 969 ac (392 ha): A 300-ac (121.4-ha) portion of this unit was removed because we determined it was not essential to the conservation of the plover. The area removed consists of the heavily used open riding area at Oceano Dunes State Vehicular Recreation Area. The open riding area is the entire area open to recreation vehicles during the western snowy plover nesting season, and extends from the park entrance to post 6 (State Parks 2004). There are marker posts, numbered 1 through 8 along the coastal strand of the riding area to provide orientation. These posts are 0.5 miles apart. The open riding area is not essential for the conservation of the western snowy plover because it is subject to regular disturbance from both street legal vehicles and OHVs. Vehicle disturbance in the open riding area has precluded it from supporting a substantial number of nesting western snowy plovers (only one nest was established in the open riding area in 2004 [State Parks 2004]). The open riding area does not contain the features essential for the conservation of the species (*e.g.*, an area free from disturbance) and is not, by definition, critical habitat. Therefore, we are not designating the open riding area, including the 3.5-mile (5.6 km) length of beach from the park entrance to the start of the nesting area at post 6, as critical habitat.

The remainder of this unit was either removed from critical habitat pursuant to section 3(5)(a) of the Act, based upon its existing management, or excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act). The remainder of the unit consists of two larger areas connected by a narrow strip of land below the mean high water (MHW) line. The narrow strip is all that remains of that part of the unit after the exclusion of Guadalupe/Nipomo Dunes National Wildlife Refuge. The Unit is located south of Grover City and Oceano and includes areas of Rancho Guadalupe County Park, managed by Santa Barbara County; and the Guadalupe Oil Field, the Oso Flaco Natural Area and Oceano Dunes Off-road Vehicular Recreation Area, managed by the California Department of Parks and Recreation. The unit extends about 9 mi (14.5 km) north along the beach from a point about 0.4 mi (0.6 km) north of Mussel Point to Marker Post 6. Marker posts numbered 1 through 8, and 0.5 mile apart, occur along the coastal strand of the ODSVRA riding area to provide orientation to park visitors. This is an important breeding area capable of supporting between 123 and 246 breeding adults (Service 2001) and over 300 wintering birds (Service 2001; George 2001). This unit is essential to species conservation because it contributes significantly to the regional conservation goal by providing habitat capable of supporting 350 breeding birds under proper management (Service 2001). It includes the following features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). This unit includes approximately 469.7 ac (190 ha) of State and local land, and 498.9 ac (201.9 ha) of private land. Potential threats that may require special management include direct human disturbance, OHVs, horses, pets, and predators.

CA 17, Vandenberg: This unit, consisting of two subunits, is located on Vandenberg Air Force Base in Santa Barbara County, California. We have excluded all essential lands in this unit from the final critical habitat designation under section 4(b)(2) of the Act (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion).

Subunit CA 17A, Vandenberg North, 626 ac (253 ha): We have excluded all essential lands in this subunit from the final critical habitat designation under section 4(b)(2) of the Act (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). This subunit is located on Vandenberg Air Force Base about 14 mi (22.5 km) southwest of the city of Santa Maria. It extends about 7.9 mi (12.7 km) north along the coast from a point along the beach 0.5 mi (0.8 km) south of Purisima Point to an unnamed creek or canyon 0.6 mi (1 km) south of Lion's Head, an area of rocky outcrops. This is an important breeding area that supports between 90 and 145 breeding adults (SRS 2003). This is also an important wintering area with up to 265 wintering birds (Page *in litt.* 2004). This subunit is capable of supporting 250 breeding birds under proper management. It includes the following features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). The subunit is entirely owned by the U.S. Air Force. Disturbance of nesting by humans and pets, military activities, predators, and the spread of dense vegetation are the primary threats to plovers in this subunit that may require special management.

Subunit CA 17B, Vandenberg South, 304 ac (123 ha): We have excluded all essential lands in this subunit from the final critical habitat designation under section 4(b)(2) of the Act (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). This subunit is located on Vandenberg Air Force Base about 9 mi (14.5 km) west of the city of Lompoc, and is entirely on U.S. Air Force land. It extends about 4.6 mi (7.4 km) north along the coast from an unnamed rocky outcrop 0.2 mi (0.3 km) north of Cañada la Honda Creek to the first rock outcropping along the beach north of the Santa Ynez River (0.8 mi (0.3 km) north of the river). This is an important breeding area that supports between 10 and 97 breeding adults (SRS 2003). This is also an important wintering area with up to 233 wintering birds (Page *in litt.* 2004). This subunit is capable of supporting 150 breeding birds under proper management. It includes the following features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Human disturbance, military activities, pets, predators, and the spread of dense-growing vegetation are the primary threats to plovers in this subunit that may require special management.

CA 18, Devereux Beach, 36 ac (15 ha): This unit is situated entirely on State and local land at Coal Oil Point, about 7 mi (11.3 km) west along the coast from the city of Santa Barbara. It extends about 3.1 mi (1.9 km) north along the coast from the western boundary of Isla Vista County Park to a point along the beach opposite the end of Santa Barbara Shores Drive. In recent years, up to 18 breeding plovers have occupied this unit (Sandoval 2004). This unit is also

an important wintering area; three hundred and sixty birds were found in the area in the most recent winter survey (Page *in litt.* 2004). The unit includes the following features essential to the species: areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Disturbance by humans and pets is the primary threat to snowy plovers in this unit that may require special management.

CA 19, Oxnard Lowlands: This unit includes four subunits near the city of Oxnard in Ventura County, California. This is an important snowy plover breeding location for this region of the coast, as the next concentration of nesting snowy plovers to the south is located on Camp Pendleton Marine Corps Base about 100 mi (160 km) away.

Subunit CA 19A, Mandalay Beach to Santa Clara River, 406 ac (164 ha): This subunit extends 6.1 mi (9.8 km) north along the coast from the north jetty of the Channel Islands harbor to a point about 0.5 mi (0.8 km) north of the Santa Clara River. However, the map of this subunit (Map 54), published in the proposed rule, depicted this unit as starting about 1 mile north of the jetty (Hollywood Beach). We have corrected the map of subunit 19A to display the complete subunit, which includes Hollywood Beach.

We removed a 4-ac (1.6 ha) area from the proposed subunit CA 19A because it is a highly disturbed and heavily used recreational area that includes volleyball courts. This area is heavily disturbed by recreational beach users and does not include the PCEs for the conservation of the species, and is not, by definition, critical habitat. However, with this removal, the final designation includes the remainder of subunit CA 19A as critical habitat.

This is an important snowy plover nesting area, with 9 to 70 birds nesting each year and is also an important wintering area for the plover, with up to 33 birds each winter (Service 2001). This unit is essential to species conservation because it contributes significantly to the regional conservation goal by providing habitat capable of supporting 64 breeding birds under proper management (Service 2001). It includes the following features essential to the species: wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). This unit includes approximately 104.5 ac (42.3 ha) of private land. The remaining 301.3 ac (123.5 ha) belongs to State or local agencies. Potential threats that may require special management include direct human disturbance, development, pets, and dune-stabilizing vegetation.

Subunit CA 19B, Ormond Beach, 175 ac (70.8 ha): This subunit is located on State lands near the cities of Port Hueneme and Oxnard. It extends about 2.9 mi (4.7 km) northwest along the coast from Arnold Road and the boundary of the Navy Base Ventura County, Point Mugu (NBVC) to the J Street Drainage, approximately 0.5 mi (0.8 km) east of the south jetty of Port Hueneme. We removed a 28-ac (11.3 ha) area of subunit CA 19B, from the J Street drainage to the south jetty of Port Hueneme, because it is a highly disturbed and heavily used recreational area that includes a fishing pier, picnic tables, barbeques, restaurant, parking lots, dog walk, and volleyball courts. This area is also the location of biennial sand replenishment activities. This area is heavily disturbed by recreational beach users and does not provide the PCEs essential for the conservation of the species (*e.g.*, an area free from disturbance) and is not, by definition, critical habitat. However, we have designated the remainder of subunit CA 19B as critical habitat.

This subunit is an important snowy plover nesting area for this region of the coast, as the next concentration of nesting snowy plovers to the south (other than the adjacent unit CA 19C) is located on Camp Pendleton Marine Corps Base about 100 mi (160 km). The number of birds nesting within this unit has varied from about 20 to 34 per year (Service 2001). CA 19B is also an important wintering area for the plover, with up to 123 birds each winter (Service 2001). This subunit is essential to species conservation because it contributes significantly to the regional conservation goal by providing habitat capable of supporting 50 breeding birds under proper management (Service 2001). It includes the following features essential to the species: Wind-blown sand dunes, areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Disturbance from humans and pets is the primary threat that may require special management for snowy plovers in this unit.

Subunit CA 19C, Mugu Lagoon North, 321 ac (130 ha): This subunit is owned by DOD (Naval Base Ventura). The DOD portion is exempted under section 4(a)(3) of the Act because of their approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). This subunit begins immediately adjacent to subunit CA 19B, at the northern coastal boundary of Navy Base Ventura County, Pt Mugu (NBVC), and extends about 3.3 mi (5.3 km) southeast. Surveys have generally provided information for the entire ''Mugu Lagoon Beach'' area, so plover population information provided here for CA 19C applies to CA 19D as well. The number of birds nesting in the area has varied from about 40 to 80 per year (Stenzel *in litt.* 2004). CA 19C and 19D are also important wintering areas for the plover, with up to 62 birds each winter (Page *in litt.* 2004). CA 19C and 19D are capable of supporting 110 breeding birds under proper management. They include the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). CA 19C is located entirely within the boundaries of the NBVC. Important threats that may require special management include direct human disturbance, military activities, and predators.

Subunit CA 19D, Mugu Lagoon South, 87 ac (35 ha): This subunit is mostly owned by DOD (Naval Base Ventura). The DOD portion is exempted under section 4(a)(3) of the Act because of the approved INRMP that provides a benefit to the species. Remaining in the designation is an 18.3-ac (7.4 ha) section at its southern end, which extends into Pt Mugu State Park, owned by the California Department of Parks and Recreation. Because surveys have commonly treated CA 19C and CA 19D as a single unit, plover population information for both subunits is provided in the narrative for CA 19C. The subunit contains the following features essential to the species: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for nesting and foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). Important threats that may require special management include direct human disturbance, military activities, and predators.

CA 20, Zuma Beach, 68 ac (28 ha): This unit is located about 8 mi (3.2 km) west of the city of Malibu. It extends about 2.8 mi (4.5 km) north along the coast from the north side of Point Dume to the base of Trancas Canyon. This unit is an important wintering location for the plover, with 130 birds surveyed in January, 2004 (Page *in litt.* 2004). It includes the following essential features: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance). This unit encompasses approximately 60 ac (24.3 ha) of CA State Parks lands, and 8 ac (3.2 ha) of privately owned land. Direct human disturbance, development, horses, and pets are the primary threats to snowy plovers in this unit that may require special management.

CA 21, Santa Monica Bay: This unit includes four subunits in Santa Monica Bay, Los Angeles County, California.

Subunit CA 21A, Santa Monica Beach, 25 ac (10 ha): This subunit is on the west coast of Los Angeles County, immediately west of the City of Santa Monica. It stretches roughly 0.9 miles (1.4 km) from Montana Avenue to the mouth of Santa Monica Canyon. This location includes the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates. It supported a wintering flock of 32 plovers in 2004 (Page *in litt.* 2004), and annually supports a significant wintering flock of plovers in a location with high quality breeding habitat. The subunit consists of 25 ac (10 ha), of which 6 ac (2.4 ha) are owned by the CA State Parks, and 19 acres (7.7 ha) are private. The primary threats that may require special management in this subunit are disturbance from human recreational use, as well as beach raking, which removes the wrack line and reduces food resources.

Subunit CA 21B, Dockweiler North, 43 ac (17 ha): This subunit is located immediately west of the Los Angeles International Airport, south of Ballona Creek and west of the El Segundo Dunes. It stretches roughly 0.5 miles (0.8 km) centered at Sandpiper Street. Essential habitat features (PCEs) in the subunit include a wide sandy beach with occasional surf-cast wrack supporting small invertebrates. This subunit, in conjuction with subunits 21C and 21D, annually supports a significant wintering flock of plovers in a location with high quality breeding habitat (Page *in litt.* 2004). It is entirely owned by the California Department of Parks and Recreation. The primary threats that may require special management are disturbance from human recreational use, as well as beach raking, which removes the wrack line and reduces food resources.

Subunit CA 21C, Dockweiler South, 24 ac (10 ha): This subunit is located immediately west of the City of El Segundo and the Hyperion Wastewater Treatment Plant. It stretches roughly 0.7 miles (1.1 km) centered at Grand Avenue. This location includes the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates. In conjuction with subunits 21B and 21D it annually supports a significant wintering flock of plovers in a location with high quality breeding habitat (Page *in litt.* 2004). This subunit consists of 24 acres (9.7 ha), of which 13 acres (5.3 ha) are owned by the California Department of Parks and Recreation, and 11 acres (4.5 ha) are privately owned. The primary threats that may require special management in this subunit are disturbance from human recreational use, as well as beach raking, which removes the wrack line and reduces food resources.

Subunit CA 21D, Hermosa State Beach, 10 ac (4 ha): This subunit is located immediately west of the City of Hermosa Beach. This subunit stretches roughly 0.25 miles (0.4 km) from 2nd Street to 6th Street. This location includes the following PCEs: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates. This location contained a wintering flock of 33 plovers in 2004, and 43 in 2003 (Clark *in litt.* 2004; Page *in litt.* 2004). In conjunction with subunits 21B and 21C it annually supports a large and significant wintering flock of plovers. This subunit consists of 10 acres (4 ha), all of which are owned by the California Department of Parks and Recreation. The primary threats that may require special management in this subunit are disturbance from human recreational use, as well as beach raking, which removes the wrack line and reduces food resources.

CA 22, Bolsa Chica Area: This unit includes two subunits in the vicinity of the Bolsa Chica wetlands in Orange County, California. The first of these subunits includes essential habitat in the wetlands themselves, while the second comprises a small area of beach immediately adjacent.

Subunit CA 22A, Bolsa Chica Reserve, 591 ac (239 ha): This subunit is located immediately west of the City of Huntington Beach and east of the Pacific Coast Highway. It contains the following essential habitat features: Tidally influenced estuarine mud flats supporting small invertebrates, and seasonally dry ponds that provide nesting and foraging habitat for snowy plovers. This location supported 31 breeding adult plovers in 2003, and 38 in 2002 (Page *in litt.* 2003). This subunit annually supports one of the largest breeding populations of snowy plovers in the region, and contributes significantly to the conservation goal for the region by providing habitat capable of supporting 50 breeding birds under proper management. This subunit consists of 591 acres (239.2 ha), all of which are privately owned. The primary threat that may require special management in this subunit is egg and chick predation. This site, an abandoned oil field, is planned to undergo significant reconstruction and restoration, which should greatly increase the available breeding habitat for snowy plovers. Subunit CA 22B, Bolsa Chica State Beach; 13 ac (2 ha): This subunit was mislabeled during the proposed rule process. The correct name, shown here for subunit CA 22B, is Bolsa Chica State Beach. The UTMs for the unit's legal description were also presented in error during the proposed rule, and are correctly provided within this rule. CA 22B is located immediately west of the City of Huntington Beach and south of CA 22A. It stretches roughly 0.3 miles (0.4 km) from Seapoint Avenue north to the future lagoon mouth channel into Bolsa Chica Ecological Reserve. This location includes the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates. The subunit contained a wintering flock of 11 plovers in 2004 (Page *in litt.* 2004), and annually supports a significant wintering flock of plovers in a location with high quality breeding habitat. This subunit consists of 12 ac (5 ha) owned by the California Department of Parks and Recreation and 1 ac (0.4 ha) that is privately owned. The primary threats that may require special management in this subunit are disturbance from human recreational use, as well as beach raking, which removes the wrack line and reduces food resources.

CA 23, Santa Ana River Mouth, 13 ac (5 ha): This unit is on the west coast of Orange County, immediately west of the City of Huntington Beach. It includes the following essential habitat features: A wide sandy beach with surf-cast wrack supporting small invertebrates, and tidally influenced estuarine mud flats that provide nesting and foraging habitat for snowy plovers. This site contains a large breeding colony of

California Least Terns and has also supported occasional breeding snowy plovers. This unit is the only beach front location in Orange County that supports adult plovers through the breeding season. The entire unit is owned by the California Department of Parks and Recreation. The primary threat that may require special management in this unit is disturbance from human recreational use.

Unit CA 24, San Onofre Beach; 40 ac (16 ha): This unit is on the west coast of San Diego County, at the northwest corner of Marine Corps Base Camp Pendleton. This unit stretches roughly 0.8 miles (1 km) from the mouth of San Mateo Creek to the mouth of San Onofre Creek and includes the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates. This location contained a wintering flock of 14 plovers in January, 2004, with 60 recorded in January, 2003 (Clark *in litt.* 2004, Page *in litt.* 2004). This unit annually supports a large and significant wintering flock of plovers (Page *in litt.* 2004) and contributes significantly to the conservation goal for the region by providing habitat capable of supporting 15 breeding birds under proper management. The unit consists of 40 acres (16 ha), of which 37.5 ac (15 ha) are owned by the California Department of Parks and Recreation, and 2.5 ac (1 ha) are privately owned. The primary threat that may require special management in this unit is disturbance from human recreational use.

CA 25 (A, B and C), Batiquitos Lagoon, 65 ac (26 ha): This unit is on the west coast of San Diego County, between the cities of Carlsbad and Encinitas. The unit includes three subunits that make up the breeding islands created for nesting seabirds and shorebirds during restoration of the lagoon in 1996. Also included is a portion of South Carlsbad State Beach that supports a significant wintering population of plovers. This unit includes the following essential habitat features: Sandy beaches and tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates. This location contained a wintering flock of 82 plovers in 2004 (Page *in litt.* 2004). Nineteen breeding adults were recorded during the 2003 window survey (Page *in litt.* 2003). This unit annually supports a large and significant wintering flock of plovers, and contributes significantly to the conservation goal for the region by providing habitat capable of supporting 70 breeding birds under proper management. This unit consists of a total of 65 acres (26 ha), of which 9 acres (4 ha) are owned by the California Department of Parks and Recreation, 21 acres (8 ha) are owned by the California Department of Fish and Game, and 35 acres (14 ha) are non-public. The primary threats that may require special management in this unit are egg and chick predation, as well as disturbance from human recreational use at South Carlsbad State Beach.

CA 26, Los Penasquitos, 24 ac (10 ha): This unit is located in San Diego County, immediately south of the City of Del Mar. It includes a portion of Torrey Pines State Beach that supports a significant wintering population of plovers. Essential habitat features supported by the unit include a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as tidally influenced estuarine mud flats with tide-cast organic debris. This location contained a wintering flock of 21 plovers in 2004, and 39 in 2003 (Clark *in litt.* 2004, Page *in litt.* 2004). This unit annually supports a large and significant wintering flock of plovers, and contributes significantly to the conservation goal for the region by providing habitat capable of supporting ten breeding birds under proper management. The unit consists of 24 acres (10 ha), all of which are owned by the California Department of Parks and Recreation. The primary threat that may require special management in this unit is disturbance from human recreational use.

CA 27, South San Diego Beaches: This unit includes six subunits in south San Diego County, California. Four of these subunits are on the Pacific coast, extending southwards from the mouth of San Diego Bay. The remaining two subunits (27D and 27E) are located in the San Diego Bay itself while a sixth subunit (27E) is in San Diego Bay itself.

Subunit CA 27A, North Island North, 117 ac (47 ha): This subunit is exempted under section 4(a)(3) of the Act because of their approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). It is located immediately west of the City of Coronado. The subunit stretches roughly 1.9 miles (3 km) from Zuniga Point to the north end of Coronado City Beach. This subunit and the adjacent subunit 27B contain the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face. This location contained a wintering flock of 37 plovers in January, 2004 (Page *in litt.* 2004). Biologists also recorded 17 breeding adults during the 2003 window survey (Page *in litt.* 2003). These subunits annually support a large and significant wintering flock of plovers, and contribute significantly to the conservation goal for the region by providing habitat capable of supporting 20 breeding birds under proper management. This subunit is entirely on land owned by the Department of Defense. The primary threats that may require special management in these subunits are disturbance from human recreational use and military activities, as well as beach raking, which removes the wrack line and reduces food resources.

Subunit CA27B North Island S., 44 ac (18 ha): This subunit is located immediately west of the City of Coronado. This subunit stretches roughly 0.6 miles (0.9 km) from the boundary with NAS North Island to the south end of the natural sand dunes at Coronado City Beach. It includes the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face. This location is adjacent to the sizable plover population at NAS North Island, which contained a wintering flock of 37 plovers in January, 2004 (Page *in litt.* 2004). Biologists also recorded 17 breeding adults at North Island during the 2003 window survey (Page *in litt.* 2003). This subunit contributes significantly to the conservation goal for the region by providing habitat, in conjunction with the adjacent military lands, capable of supporting 20 breeding birds under proper management. This unit consists of land 44 acres owned by the City of Coronado. The primary threats that may require special management in these subunits are disturbance from human recreational use as well as beach raking, which removes the wrack line and reduces food resources.

Subunit CA 27C, Silver Strand, 99 ac (40 ha): All Navy lands within subunit CA 27C have been exempted under section 4(a)(3) of the Act because of their approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). The remainder of this subunit (Silver Strand State Beach) was excluded from critical habitat designation under section 4(b)(2) of the Act based upon its high economic costs (see section titled Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section

4(b)(2) of the Act). This subunit is located immediately south of the City of Coronado. It stretches roughly 3.5 miles (5.6 km) along the Pacific coast side of the Silver Strand, from the southern end of NAB Coronado to the south end of the Naval Radio Receiving Facility. The essential habitat features of this subunit include a wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as wind-blown sand in dune systems immediately inland of the active beach face. In conjunction with excluded habitat on NAB Coronado, this location contained wintering flocks totaling 56 plovers in 2004 (Page *in litt.* 2004). Fifty eight breeding adults were recorded during the 2003 window survey (Page *in litt.* 2003). This subunit annually supports a large and significant wintering flock of plovers (Page *in litt.* 2004), and will contribute significantly to the recovery goal for the region by supporting 65 breeding birds under proper management. The subunit consists of 96 ac (39 ha) owned by the California Department of Parks and Recreation, and 3 ac (1 ha) of non-public land. The primary threat that may require special management in this unit is disturbance from human recreational use and military training, as well as egg and chick predation.

Subunit CA 27D, Delta Beach, 85 ac (35 ha): All lands within subunit CA 27D have been exempted under section 4(a)(3) of the Act because of the Navy's approved INRMP that provides a benefit to the species (see Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act section for a detailed discussion). This subunit is located immediately south of the City of Coronado on the west side of San Diego Bay. It includes the following essential habitat features: sandy beaches above and below mean high tide line and tidally influenced estuarine mud flats with tide-cast organic debris that provide nesting and foraging habitat for snowy plovers. This location contained a wintering flock of 32 plovers in 2004 (Page *in litt.* 2004). It annually supports a large and significant wintering flock of plovers, and contributes significantly to the conservation goal for the region by providing habitat capable of supporting 10 breeding birds under proper management. This subunit consists of 85.3 acres (34.5 ha), all of which are owned by the Department of Defense. The primary threat that may require special management in this subunit is egg and chick predation.

Subunit CA 27E, Sweetwater National Wildlife Refuge, 128 ac (52 ha): This subunit is located immediately west of the City of Chula Vista on the east side of San Diego Bay. It includes the following essential habitat features: Sandy beaches above and below mean high tide line and tidally influenced estuarine mud flats that provide nesting and foraging habitat for snowy plovers. This location contained a wintering flock of 36 plovers in 2004 (Page *in litt.* 2004). It annually supports a large and significant wintering flock of plovers, and contributes significantly to the conservation goal for the region by providing habitat capable of supporting 20 breeding birds under proper management. This subunit consists of 128 ac (52 ha), of which 77 ac (31 ha) are owned by the U.S. Fish and Wildlife Service, and 51 ac (21 ha) are privately owned. The primary threat that may require special management in this subunit is egg and chick predation.

Subunit CA 27F, Tijuana Estuary and Beach, 182ac (73.5 ha): This unit was slightly modified to remove a small amount of acreage of Navy land exempted under 4(a)(3) (See exemptions under 4(a)(3) below). The subunit is located immediately south of the City of Imperial Beach. It stretches roughly 2.3 miles (3.7 km) from the end of Seacoast Drive to the U.S./Mexico border. This location includes the following essential habitat features: A wide sandy beach with occasional surf-cast wrack supporting small invertebrates, as well as tidally influenced estuarine mud flats with tide-cast organic debris supporting small invertebrates for foraging. This subunit contained wintering flocks totaling 93 plovers in 2004 (Page *in litt.* 2004). It also supported at least 12 breeding adults in 2003, as indicated by the 2003 window survey (Page *in litt.* 2003). This subunit annually supports a large and significant wintering flock of plovers, and contributes significantly to the conservation goal for the region by providing habitat capable of supporting 40 breeding birds under proper management. The subunit is 182ac (73.5 ha), of which 76 acres (31 ha) are owned by the California Department of Parks and Recreation, 83 acres (34 ha) are owned by the U.S. Fish and Wildlife Service, and 22 acres (9 ha) are non-public. The primary threats that may require special management in this unit are disturbance from human recreational use and predation of chicks and eggs.

**Effects of Critical Habitat Designation**

*Section 7 Consultation*

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In our regulations at 50 CFR 402.2, we define destruction or adverse modification as ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that their actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also

provide reasonable and prudent alternatives to the project, if any are identifiable. ''Reasonable and prudent alternatives'' are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or a conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat, or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the Pacific Coast WSP or its critical habitat will require consultation under section 7. Activities on private or State-owned lands, or lands under County or local jurisdictions requiring a permit from a Federal agency, such as a permit from the Army Corps of Engineers under section 404 of the Clean Water Act, a Section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, Federal Highway Administration or Federal Emergency Management Agency funding), will be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted, do not require section 7 consultations.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the Pacific Coast WSP. Federal activities that, when carried out, may adversely affect critical habitat for the Pacific Coast WSP include, but are not limited to:

(1) Actions and management efforts affecting Pacific Coast WSP on Federal lands such as national seashores, parks, and wildlife reserves;

(2) Dredging and dredge spoil placement activities that permanently remove PCEs to the extent the essential biological function of plover habitat is adversely affected for the foreseeable future;

(3) Construction and maintenance of eroded areas or structures (*e.g.*, roads, walkways, marinas, salt ponds, access points, bridges, culverts) which interfere with plover nesting, breeding, or foraging, produce increases in predation, or promote a dense growth of vegetation that precludes an area's use by plovers;

(4) Stormwater and wastewater discharge from communities;

(5) Flood control actions that change the PCEs to the extent that the habitat no longer contributes to the conservation of the species.

Such activities may adversely modify critical habitat by flooding, covering with material, removing tide-cast organic debris, removing or depositing substrate in such a way as to diminish invertebrate prey, encourage dense vegetation growth, inundating an area with contaminants or failing to adequately provide for contaminant removal, or by failing to provide a relatively disturbance-free area for the completion of biological functions.

All lands designated as critical habitat are within the historical geographic area occupied by the species, and are likely to be used by the Pacific Coast WSP whether for foraging, breeding, growth of juveniles, dispersal, migration or sheltering. Some of these lands may currently be subject to activities identified as potentially adversely affecting the critical habitat. The Service will determine if Federal actions taken within these areas result in adverse modification to critical habitat when the Section 7 consultation process is implemented. We consider all lands included in this designation to be essential to the conservation of the species. Federal agencies already consult with us on activities that may affect the Pacific Coast WSP in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. Additionally, many of the critical habitat units designated under this rule were previously designated on December 9, 1999 (64 FR 68508). As a consequence, we believe this designation of critical habitat is not likely to result in a significant regulatory burden above that already in place due to the presence of the listed species and previously designated critical habitat.

If you have questions regarding whether specific activities will constitute destruction or adverse modification of critical habitat, contact the Field Supervisor, Arcata Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife and plants and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 N.E. 11th Avenue, Portland, Oregon 97232 (telephone 503/231–2063; facsimile 503/231–6243.

*Application of Section 3(5)(A) and 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act*

Section 3(5)(A) of the Act defines critical habitat as the specific areas within the geographic area occupied by the species on which are found those physical and biological features (i) essential to the conservation of the species and (ii) which may require special management considerations or protection. Therefore, areas within the geographic area occupied by the species that do not contain the features essential for the conservation of the species are not, by definition, critical habitat. Similarly, areas within the geographic area occupied by the species that do not require special management also are not, by definition, critical habitat. To determine whether an area requires special management, we first determine if the essential features located there generally require special management to address applicable threats. If those features do not require special management, or if they do in general but not for the particular area in question because of the existence of an adequate management plan or for some other reason, then the area does not require special management.

We consider a current plan to provide adequate management or protection if it meets three criteria: (1) The plan is complete and provides a conservation benefit to the species (*i.e.*, the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan); (2) the plan provides assurances that the conservation management strategies and actions will be implemented (*i.e.*, those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation

schedule or adequate funding for implementing the management plan); and, (3) the plan provides assurances that the conservation strategies and measures will be effective (*i.e.*, it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

Section 318 of the fiscal year 2004 National Defense Authorization Act (Pub. L. 108–136) amended the Act to address the relationship of Integrated Natural Resources Management Plans (INRMPs) to critical habitat by adding a new section 4(a)(3)(B). This provision prohibits the Service from designating as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an INRMP prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

Further, section 4(b)(2) of the Act states that critical habitat shall be designated, and revised on the basis of the best scientific data available after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined, following an analysis, that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species.

In our critical habitat designations we used both the provisions outlined in sections 3(5)(A) and 4(b)(2) of the Act to evaluate those specific areas that we are proposing as critical habitat. Lands we have found do not meet the definition of critical habitat under section 3(5)(A), and lands excluded pursuant to section 4(b)(2), include those covered by the following types of plans if they provide assurances that the conservation measures they outline will be implemented and effective: (1) Legally operative HCPs that cover the species; (2) draft HCPs that cover the species and have undergone public review and comment (*i.e.*, pending HCPs); (3) Tribal conservation plans that cover the species; (4) State conservation plans that cover the species; and, (5) National Wildlife Refuge System Comprehensive Conservation Plans. See below for a detailed discussion.

*Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) of the Act*

As discussed above, under section 4(a)(3) of the Act, the Secretary is prohibited from designating as critical habitat any Department of Defense lands or other geographical areas that are subject to an INRMP if the Secretary has determined in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. In order to qualify for this exemption, an INRMP must be found to provide benefit to the species in question. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found there. Each INRMP includes an assessment of the ecological needs on the military installation, including conservation provisions for listed species; a statement of goals and priorities; a detailed description of management actions to be implemented to provide for these ecological needs; and a monitoring and adaptive management plan. We consult with the military on the development and implementation of INRMPs for installations with listed species. Habitat on military installations with completed and approved INRMPs that provide a benefit to the species are exempt from designation as critical habitat pursuant to section 4(a)(3)(B).

We are re-affirming our exemption of the U.S. Navy's San Nicolas Island and have exempted lands owned by U.S. Navy (Naval Base Coronado, Naval Base Ventura County) and the U.S. Marine Corps (Camp Pendleton) from this final critical habitat designation pursuant to section 4(a)(3) of the Act based on legally operative INRMPs that provide a benefit to the Pacific Coast WSP. This includes all or portions of Units CA 27 at Naval Base Coronado, CA at Camp Pendleton, and CA 19 and Naval Base Ventura County. In our December 17, 2004, proposed rule (69 FR 75608), we excluded Camp Pendleton and Naval Base Coronado under section 4(b)(2) of the Act for national security reasons, we now recognize that we are prohibited from designating critical habitat on those lands pursuant to section 4(a)(3) of the Act based on their legally operative INRMPs that have been found to provide a benefit to the Pacific Coast WSP. We are excluding all essential habitat on Vandenberg Air Force Base (AFB) under section 4(b)(2) of the Act based on impacts to national security. Vandenberg AFB is in the process of completing an INRMP and accompanying Endangered Species Management Plan (ESMP), which will provide management for the Pacific Coast WSP.

**San Nicolas Island**

As described in our December 17, 2004, proposed rule (69 FR 75608) all 534 ac (212 ha) of essential habitat on San Nicolas Island, in Ventura County, California are exempt from this critical habitat designation pursuant to section 4(a)(3) of the Act. This area corresponds roughly to location CA–100 in our Draft Recovery Plan, is owned by the U.S. Navy, and contains habitat capable of supporting 150 breeding plovers with adaptive management. The U.S. Navy has completed an INRMP which addresses plover management for the area. The Secretary has determined that the INRMP provides a benefit to the species and provided a biological opinion during formal consultation under section 7 of the Act.

*Naval Base Coronado (NBC)*

The U.S. Navy completed a final INRMP in May 2002 for Naval Base Coronado, which includes North Island Naval Air Station, Naval Amphibious Base, Coronado, and Naval Radio Receiving Facility, that provides a benefit to the Pacific Coast WSP. The Proposed Management Strategy for the Western Snowy Plover (P. 4–56) itemizes the actions to which the Navy has committed in order to manage the species on their lands. Many of the items reiterate terms and conditions of previous biological opinions issued by the Service. However, the INRMP does go on to stipulate other actions above and beyond these requirements including minimizing activities which can affect invertebrate populations upon which shorebirds depend for foraging, identifying opportunities to use dredge material having high sand content for expansion and rehabilitation of beach areas to create improved nesting substrate, and replacing exotic iceplant and other nonnatives from remnant dunes with native vegetation to comply with Executive Order 13112 on Invasive Species and the Noxious Weed Act. These activities would enhance the habitat and population of western snowy plovers on Navy lands. Therefore, we find that the INRMP for Naval Base Coronado provides a benefit for the Pacific Coast WSP and pursuant to section 4(a)(3) of the Act, Navy lands within proposed unit CA 27 are exempt from critical habitat.

*Marine Corps Base, Camp Pendleton (MCBCP)*

The Marine Corps Base, Camp Pendleton completed a final INRMP in

October 2001 that provides a benefit to the Pacific Coast WSP. This INRMP itemizes the actions to which the Marine Corps has committed in order to manage the species on their lands. Many of the items reiterate terms and conditions of previous biological opinions issued by the Service. These include annually fencing and posting warning signs around the plover nesting areas; annually monitoring the plover population and locations, providing estimates of the number of breeding individuals, reproductive success, distribution, abundance, and habitat; and continuing predator control measures within the vicinity of plover nesting sites. These activities have enhanced the habitat and population of western snowy plovers at Camp Pendleton. Therefore, we find that the INRMP for Marine Corps Base, Camp Pendleton provides a benefit for the Pacific Coast WSP and pursuant to section 4(a)(3) of the Act, Marine Corps lands at Camp Pendleton are exempt from critical habitat.

*Naval Base Ventura County*

We have reviewed Naval Base Ventura County's INRMP and biological opinion, and the Secretary has determined that Naval Base Ventura County's INRMP provides a benefit to the western snowy plover and therefore, consistent with Public Law 108–136 (Nov. 2003): Nat. Defense Authorization Act for FY04 and Section 4(a)(3) of the Act, the Department of Defense's Naval Base Ventura County (subunits CA 19C and part of CA 19D) is exempt from critical habitat based on the adequacy of their legally operative INRMP.

*Vandenberg Air Force Base*

We are excluding Vandenberg AFB under section 4(b)(2) of the Act based on information we received regarding use of these areas for mission-essential training and the potential impacts on national security. Based on the following analysis, we find the benefit of excluding these units outweighs the benefit of including them, primarily due to the impact on national security.

The western snowy plover occupies 12.5 miles (20 km) of beach and dune habitat on Vandenberg Air Force Base. Vandenberg contains features essential to the conservation of the species and is of important biological value because it supports approximately 20 percent of the Pacific coast population of western snowy plovers.

The Air Force recognizes the need for protection and conservation of sensitive species, including the western snowy plover, on military lands and has identified conservation measures to protect and conserve western snowy plovers and their habitat. The Air Force has coordinated with us to finalize the development of their Endangered Species Management Plan (ESMP) for the western snowy plover at Vandenberg, which currently guides management of all lands occupied by western snowy plovers at this base. The ESMP includes measures to minimize harm to the western snowy plover from base activities and outlines actions to ensure the persistence of western snowy plovers on the installation. The ESMP is an appendix to, and part of, the INRMP for Vandenberg Air Force Base. We anticipate the INRMP will be signed in late 2005.

*(1) Benefits of Inclusion*

The primary benefit of any critical habitat with regard to activities that require consultation pursuant to section 7 of the Act is to ensure that the activity will not destroy or adversely modify designated critical habitat. However, because the Air Force has worked cooperatively with the Service to develop an ESMP that protects the western snowy plover and its essential habitat on Vandenberg, and the nearly finalized INRMP is expected to be completed in 2005 (for which we will complete a Section 7 consultation), we do not believe that designation of critical habitat on the base will significantly benefit the western snowy plover beyond the protection already afforded the species under the Act. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for the Pacific Coast WSP that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit. We completed a section 7 consultation on the ESMP.

The area excluded as critical habitat is currently occupied by the species. If this area were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained previously, in Effects of Critical Habitat Designation section. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or would result in take would be required even without the critical habitat designation. Primary constituent elements in this area would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, as the area is occupied by the Pacific Coast WSP, consultation for activities which may adversely affect the species, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

In *Sierra Club* v. *Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. However, we believe that there would be little additional informational benefit gained from including Vandenberg AFB within the designation because the educational benefits have been largely accomplished through the INRMP development process and development of the ESMP for the western snowy plover. The Air Force is already aware of essential western snowy plover habitat areas on the installation. In addition, we have already completed formal section 7 consultation on the ESMP.

*(2) Benefits of Exclusion*

Substantial benefits are expected to result from the exclusion of Vandenberg from critical habitat. The Air Force has stated in their February 7, 2005, comment letter that designation of beaches and coastline at Vandenberg, as critical habitat, would limit the amount of coastline available for executing their mission. Mission activities at Vandenberg include: Launching and tracking satellites in space, training missile crews, supporting ship to shore military training exercises, testing and evaluating the country's intercontinental ballistic missile

systems, and supporting aircraft tests in the Western Test Range/Pacific Missile Range (California, Hawaii, and the western Pacific Ocean). Designation of critical habitat on the base would require the Air Force to engage in additional consultation with us on activities that may affect designated critical habitat. The requirement to consult on activities occurring on the base could delay and impair the ability of the Air Force to conduct mission critical activities, thereby adversely affecting national security.

In addition, exclusion of Vandenberg beaches from the final designation will allow us to continue working with the Air Force in a spirit of cooperation and partnership. The DOD generally views designation of critical habitat on military lands as an indication that their actions to protect the species and its habitat are inadequate. Excluding these areas from the perceived negative consequences of critical habitat will facilitate cooperative efforts between the Service and the Air Force to formulate the best possible INRMP and ESMP, and continue effective management of the western snowy plover at Vandenberg Air Force Base.

*(3) Benefits of Exclusion Outweigh the Benefits of Inclusion*

In 2004, we had a series of meetings with the Air Force to discuss their management of western snowy plovers, their essential habitat, and possible impacts to the base. We also received extensive comments from the Air Force during the public comment period. In light of the Air Force's ESMP for the western snowy plover, and the Air Force's need to maintain a high level of readiness regarding mission critical National security interests, we excluded critical habitat on all lands within unit CA 17, including all Vandenberg lands, under section 4(b)(2) of the Act. We find that the benefits of excluding these lands from critical habitat outweigh the benefits of including them.

*(4) Exclusion Will Not Result in Extinction of the Species*

We find that the exclusion of these areas will not lead to the extinction of the western snowy plover because Air Force activities at Vandenberg have had little, if any, adverse effect on western snowy plovers, and the ESMP is expected to effectively manage for the persistence of the western snowy plovers at this installation. Also because these lands are occupied by plovers, any actions which might adversely affect the western snowy plover must undergo a consultation with the Service under the requirements of section 7 of the Act. The western snowy plover is protected from take under section 9. The exclusions leave these protections unchanged from those which would exist if the excluded areas were designated as critical habitat. Based upon the above, we find that these exclusions would not result in extinction of the species.

*Relationship of Critical Habitat to National Wildlife Refuges—Application of Section 3(5)(A) of the Act*

We are not including essential habitat in all or portions of units CA 12C, CA 16, and WA 4 that fall within the boundaries of Salinas River National Wildlife Refuge (NWR), Guadalupe-Nipomo Dunes NWR, or Willapa NWR respectively under section 3(5)(A) of the Act. The Salinas River NWR has completed a Comprehensive Conservation Plan (CCP) that addresses plovers, Willapa NWR is in the process of completing a CCP and is actively managing for snowy plovers on refuge lands, and Guadalupe-Nipomo Dunes NWR has completed a plover management plan. In order for the Secretary to determine that an area is adequately managed and does not require special management, the Secretary must evaluate existing management and find that it provides (1) a conservation benefit to the species; (2) reasonable assurances for implementation; and (3) reasonable assurances that conservation efforts will be effective. The Secretary has reviewed the management plans and actions for each of the three refuges and has determined that all three refuges are adequately managed for the Pacific Coast WSP, and therefore do not need special management are not included in this final critical habitat designation pursuant to section 3(5)(A) of the Act.

**Salinas River NWR**

We are re-affirming our application of section 3(5)(A) of the Act to essential habitat at Salinas River NWR as described in our December 17, 2004, proposed rule (69 FR 75608). Salinas River NWR has completed a CCP that provides a conservation benefit to the Pacific Coast WSP. The CCP emphasizes the protection of plovers by a variety of means, including seasonal closure of nesting areas, nest exclosures, symbolic fencing (low cable fence used to discourage humans from approaching nests), and law enforcement patrols. Under the CCP plovers are monitored each breeding season for reproductive success and all nestlings are banded for further monitoring. In addition, mammalian predators are managed to selectively remove problem predators during the plover breeding season. We expect funding to continue to this refuge through the Federal budget process to continue to implement the CCP. An intra-Service section 7 consultation was completed on the CCP on June 25, 2002 (Service 2002). The Service found that most of the management actions proposed in the CCP would be effective and provide a conservation benefit to plovers. Therefore, all essential habitat for the Pacific Coast WSP within the Salinas River NWR (142–ac (57.5 ha) portion of subunit 12C) is not included in this final critical habitat designation as these lands are adequately managed pursuant to section 3(5)(A) of the Act.

**Guadalupe/Nipomo Dunes NWR**

We are re-affirming our application of section 3(5)(A) of the Act to essential habitat at Guadalupe/Nipomo Dunes NWR as described in our December 17, 2004, proposed rule (69 FR 75608). Guadalupe/Nipomo Dunes NWR has completed a plover management plan that provides a conservation benefit to this species. The plan provides for the protection of plovers by a variety of means, including seasonal closure of nesting areas, nest exclosures, symbolic fencing (low cable fence used to discourage humans from approaching nests), and law enforcement patrols. Under the plan plovers are monitored each breeding season for reproductive success; the number of plovers wintering on the refuge is also monitored. We expect funding to continue to this refuge through the Federal budget process to continue to implement the plover management plan. An intra-Service section 7 consultation was completed on the refuge's plover management plan on March 22, 2001 (Service 2001). The Secretary determined that the measures included in the plan would be effective and benefit plovers. Therefore, all essential habitat for the Pacific Coast WSP within the Guadalupe/Nipomo Dunes NWR (234–ac (94.7 ha) portion of unit 16) is not included in this final critical habitat designation as these lands are adequately managed pursuant to section 3(5)(A) of the Act.

**Willapa NWR**

Willapa NWR is in the process of completing a CCP, and is currently operating under a management plan that was signed in 1986, which provides for management for the Pacific Coast WSP. Although the 1986 refuge management plan was signed and implemented prior to the Pacific Coast WSP listing in 1993, it addresses issues related to human disturbance and protection of the snowy

plover as a sensitive species, and serves as in interim management plan.

The Leadbetter Point Unit of Willapa NWR is one of the northern-most breeding sites for the Pacific Coast WSP. Refuge personnel from Willapa NWR have been monitoring snowy plovers on the refuge annually since 1984. Nest exclosures were first used on the refuge in 2004 and are credited with significant improvement in hatching success. The refuge has been posting snowy plover nesting areas on the Leadbetter Unit since the species was listed. Area closure signs are erected in early to mid-March each year and taken down in October. Symbolic fencing is erected at two areas where hiking trails emerge onto the beach to direct people to the wet sand portion of the beach. The Leadbetter unit of Willapa NWR is closed to motor vehicles except during special razor clam seasons (generally 2–3 days a month from late fall through early spring). Dogs are not permitted on the beach. The refuge is committed to minimizing disturbance to snowy plovers during the nesting season and will continue to manage public use at the Leadbetter Unit.

Historical nesting habitat for the snowy plover on Leadbetter Point consisted of extensive areas of open or sparsely vegetated, low dunes. Much of this habitat has been invaded by American and European beachgrass. The refuge initiated habitat restoration of historical nesting areas at Leadbetter Spit in 2002. Sixteen acres of beachgrass have been cleared to date and snowy plovers have nested every year in the restoration area since the first acre was cleared.

We expect funding to continue to this refuge through the federal budget process to continue implementing plover management and finalization and implementation of the CCP. The Secretary has determined that the management measures at Willapa NWR are effective and provide a conservation benefit to the Pacific Coast WSP. Therefore, all essential habitat for this species at Willapa NWR (Unit WA 4) is not included in this final critical habitat designation as these lands are adequately managed pursuant to section 3(5)(A) of the Act.

*Relationship of Critical Habitat to Approved Habitat Conservation Plans (HCPs)—Exclusions Under Section 4(b)(2) of the Act*

We are excluding critical habitat from approximately 23 ac (9.3 ha) of non-Federal lands within the San Diego Multiple Species Conservation Program (MSCP) Area under section 4(b)(2) of the Act. Non-Federal lands we are excluding from critical habitat include lands at the mouth of the San Diego River.

**San Diego Multiple Species Conservation Program (MSCP)**

Section 4(b)(2) of the Act states that critical habitat shall be designated, and revised, on the basis of the best available scientific data available after taking into consideration the economic impact, impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. An area may be excluded from critical habitat if it is determined that the benefits of such exclusion outweigh the benefits of specifying a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. Consequently, we may exclude an area from critical habitat based on economic impacts, impacts on national security, or other relevant impacts such as preservation of conservation partnerships, if we determine the benefits of excluding an area from critical habitat outweigh the benefits of including the area in critical habitat, provided the action of excluding the area will not result in the extinction of the species.

Below we first provide some general background information on the San Diego Multiple Species Conservation Plan/Habitat Conservation Plan (MSCP/HCP), followed by an analysis pursuant to section 4(b)(2) of the Act of the benefits of including San Diego MSCP/HCP land within the critical habitat designation, an analysis of the benefits of excluding this area, and an analysis of why we believe the benefits of exclusion are greater than those of inclusion. Finally, we provide a determination that exclusion of these lands will not result in extinction of the Pacific Coast WSP.

In southwestern San Diego County, the MSCP effort encompasses more than 236,000 ha (582,000 ac) and involves the participation of the County of San Diego and 11 cities, including the City of San Diego. This regional HCP is also a regional subarea plan under the NCCP program and is being developed in cooperation with California Department of Fish and Game. The MSCP provides for the establishment of approximately 69,573 ha (171,000 ac) of preserve areas to provide conservation benefits for 85 federally listed and sensitive species over the life of the permit (50 years), including the Pacific Coast WSP.

We have excluded from this critical habitat designation approximately 23 ac (9.3 ha) of non-Federal lands within the Multiple Habitat Preserve Alternative (MHPA) that are targeted for conservation within the City of San Diego Subarea Plan under the San Diego Multiple Species Conservation Plan (MSCP) under section 4(b)(2) of the Act. Non-Federal lands that contain the features essential to the conservation of the species are excluded from critical habitat include lands at the mouth of the San Diego River for the Pacific Coast WSP.

Conservation measures specific to the Pacific Coast WSP within the San Diego MSCP/HCP include conservation of 93% of potential habitat (about 650 acres), including 99% of saltpan habitat and 90–95% of beach outside of intensive recreational beaches. The City of San Diego must implement measures to protect nesting sites from human disturbance during the reproductive season and control predators. Based on habitat preservation and potential impacts, direct effects to the species are not anticipated from implementation of the plan. Indirect effects will include edge effects from increased recreation uses, beach cleaning, and predation resulting from additional landscaping and structures that could be used as raptor perches. Effects to this species are to be minimized through conditions for coverage that include protection of nesting sites from human disturbance during the reproductive season and specific measures to protect against detrimental edge effects. No take of plovers was authorized through the plan.

*(1) Benefits of Inclusion*

Overall, we believe that there is minimal benefit from designating critical habitat for the Pacific Coast WSP within the San Diego MSCP/HCP because, as explained above, these lands are already managed for the conservation of covered species, including the Pacific Coast WSP. Below we discuss benefits of inclusion of these HCP lands.

A benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for the Pacific Coast WSP that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was

previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit. We completed a section 7 consultation on the issuance of the section 10(a)(1)(B) permit for the San Diego MSCP/HCP on June 6, 1997, and concluded that no take of this species is authorized under the plan, and therefore implementation of the plan is not likely to result in jeopardy to the species.

The area excluded as critical habitat is currently occupied by the species. If this area were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained previously, in Effects of Critical Habitat Designation section. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or would result in take would be required even without the critical habitat designation.

Primary constituent elements in this area would be protected from destruction or adverse modification by Federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, as the mouth of the San Diego River is occupied by the Pacific Coast WSP, consultation for activities which may adversely affect the species, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

In *Sierra Club* v. *Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. However, we believe that there would be little additional informational benefit gained from including the San Diego MSCP/HCP within the designation because this area is included in the HCP. Consequently, we believe that the informational benefits are already provided even though this area is not designated as critical habitat. Additionally, the purpose of the San Diego MSCP/HCP to provide protection and enhancement of habitat for the Pacific Coast WSP is already well established among State and local governments, and Federal agencies.

The inclusion of these 23 ac (9.3 ha) of non-Federal land as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. A benefit of inclusion would be the requirement of a Federal agency to ensure that their actions on these non-Federal lands do not likely result in jeopardizing the continued existence of the species or result in the destruction or adverse modification of critical habitat. This additional analysis to determine destruction or adverse modification of critical habitat is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these 23 ac (9.3 ha) of non-Federal lands would likely consider the conservation value of these lands as identified in the San Diego MSCP/HCP and take the necessary steps to avoid jeopardy or the destruction or adverse modification of critical habitat.

As discussed below, however, we believe that designating any non-Federal lands within the MHPA as critical habitat would provide little additional educational and Federal regulatory benefits for the species. Because the excluded areas are occupied by the species, there must be consultation with the Service over any action which may affect these populations or that would result in take. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the public review and comment of the environmental impact documents which accompanied the development of the San Diego MSCP/HCP and the recognition by the City of San Diego of the presence of the threatened Pacific Coast WSP and the value of their lands for the conservation and recovery of the species.

For 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot*, the Fish and Wildlife Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. However, in *Gifford Pinchot* the court noted the government, by simply considering the action's survival consequences, was reading the concept of recovery out of the regulation. The court, relying on the CFR definition of adverse modification, required the Service to determine whether recovery was adversely affected. The *Gifford Pinchot* decision arguably made it easier to reach an ''adverse modification'' finding by reducing the harm, affecting recovery, rather than the survival of the species. However, there is an important distinction: Section 7(a)(2) limits harm to the species either through take or critical habitat. It does not require positive improvements or enhancement of the species status. Thus, any management plan which considers enhancement or recovery as the management standard will almost always provide more benefit than the critical habitat designation.

*(2) Benefits of Exclusion*

As mentioned above, the San Diego MSCP/HCP provides for the conservation of occupied and potential habitat, the control of nest predators, and measures to protect nesting sites from human disturbance. The San Diego MSCP/HCP therefore provides for protection of the PCEs, and addresses special management needs such as predator control and management of habitat. Designation of critical habitat would therefore not provide as great a benefit to the species as the positive management measures in the plan.

The benefits of excluding lands within HCPs from critical habitat designation include relieving landowners, communities, and counties of any additional regulatory burden that might be imposed by a critical habitat designation consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Many HCPs, particularly large regional HCPs take many years to develop and, upon completion, become regional conservation plans that are consistent with the recovery objectives for listed species that are covered within the plan area. Additionally, many of these HCPs provide conservation benefits to unlisted, sensitive species. Imposing an additional regulatory review after an HCP is completed solely as a result of the designation of critical habitat may undermine conservation efforts and partnerships in many areas. In fact, it could result in the loss of species' benefits if participants abandon the voluntary HCP process because the critical habitat designation may result in additional regulatory requirements than faced by other parties who have not voluntarily participated in species conservation. Designation of critical habitat within the boundaries of

approved HCPs could be viewed as a disincentive to those entities currently developing HCPs or contemplating them in the future. Another benefit from excluding these lands is to maintain the partnerships developed among the City of San Diego, the State of California, and the Service to implement the San Diego MSCP/HCP. Instead of using limited funds to comply with administrative consultation and designation requirements which can not provide protection beyond what is currently in place, the partners could instead use their limited funds for the conservation of this species.

A related benefit of excluding lands within HCPs from critical habitat designation is the unhindered, continued ability to seek new partnerships with future HCP participants including States, Counties, local jurisdictions, conservation organizations, and private landowners, which together can implement conservation actions that we would be unable to accomplish otherwise. If lands within HCP plan areas are designated as critical habitat, it would likely have a negative effect on our ability to establish new partnerships to develop HCPs, particularly large, regional HCPs that involve numerous participants and address landscape-level conservation of species and habitats. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

Furthermore, an HCP or NCCP/HCP application must itself be consulted upon. While this consultation will not look specifically at the issue of adverse modification to critical habitat, unless critical habitat has already been designated within the proposed plan area, it will determine if the HCP jeopardizes the species in the plan area. In addition, Federal actions not covered by the HCP in areas occupied by listed species would still require consultation under section 7 of the Act. HCP and NCCP/HCPs typically provide for greater conservation benefits to a covered species than section 7 consultations because HCPs and NCCP/HCPs assure the long-term protection and management of a covered species and its habitat, and funding for such management through the standards found in the 5 Point Policy for HCPs (64 FR 35242) and the HCP ''No Surprises'' regulation (63 FR 8859). Such assurances are typically not provided by section 7 consultations that, in contrast to HCPs, often do not commit the project proponent to long-term special management or protections. Thus, a consultation typically does not accord the lands it covers the extensive benefits a HCP or NCCP/HCP provides. The development and implementation of HCPs or NCCP/HCPs provide other important conservation benefits, including the development of biological information to guide the conservation efforts and assist in species conservation, and the creation of innovative solutions to conserve species while allowing for development.

In the biological opinion for the San Diego MSCP/HCP, the Service concluded that no take of this species is authorized under the plan and therefore implementation of the plan is not likely to result in jeopardy to the species.

*(3) Benefits of Exclusion Outweigh the Benefits of Inclusion*

We have reviewed and evaluated the exclusion of critical habitat for the Pacific Coast WSP from approximately 23 ac (9.3 ha) of non-Federal lands within the San Diego MSCP/HCP; and based on this evaluation, we find that the benefits of exclusion (avoid increased regulatory costs which could result from including those lands in this designation of critical habitat, ensure the willingness of existing partners to continue active conservation measures, maintain the ability to attract new partners, and direct limited funding to conservation actions with partners) of the lands containing features essential to the conservation of the Pacific Coast WSP within the San Diego MSCP/HCP outweigh the benefits of inclusion (limited educational and regulatory benefits, which are largely otherwise provided for under the MSCP) of these lands as critical habitat. The benefits of inclusion of these 23 ac (9.3 ha) of non-Federal lands as critical habitat are lessened because of the significant level of conservation provided to the Pacific Coast WSP under the San Diego MSCP/HCP (conservation of occupied and potential habitat, control of nest predators, and restrictions on disturbance and harassment). In contrast, the benefits of exclusion of these 23 ac (9.3 ha) of non-Federal lands as critical habitat are increased because of the high level of cooperation by the City of San Diego and State of California to conserve this species and this partnership exceeds any conservation value provided by a critical habitat designation.

*(4) Exclusion Will Not Result in Extinction of the Species*

We believe that exclusion of these 23 ac (9.3 ha) of non-Federal lands will not result in extinction of the Pacific Coast WSP since these lands will be conserved and managed for the benefit of this species pursuant to the San Diego MSCP/HCP. The San Diego MSCP/HCP includes specific conservation objectives, avoidance and minimization measures, and management for the San Diego MSCP/HCP that exceed any conservation value provided as a result of a critical habitat designation.

The jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process also provide assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the Pacific Coast WSP in other areas that will be accorded the protection from adverse modification by federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Additionally, the species within the San Diego MSCP/HCP occurs on lands protected and managed either explicitly for the species or indirectly through more general objectives to protect natural values. These factors acting in concert with the other protections provided under the Act, lead us to find that exclusion of these 23 ac (9.3 ha) within the San Diego MSCP/HCP will not result in extinction of the Pacific Coast WSP.

*Relationship of Critical Habitat to San Francisco Bay—Exclusions Under Section 4(b)(2) of the Act*

We are re-affirming our December 17, 2004, proposed rule exclusion of six units bordering the south San Francisco Bay totaling 1,847 ac (747.4 ha) under section 4(b)(2) of the Act (69 FR 75608). Pacific Coast WSP habitat in this region consists primarily of artificial salt ponds and associated levees, much of which has recently come under the management of various local, State and Federal agencies including the Service and the California Department of Fish and Game (CDFG). The agencies are developing a management and restoration plan for the salt ponds that will take into account the conflicting habitat needs of at least four threatened or endangered species (*i.e.*, Pacific Coast WSPs, clapper rails, salt marsh harvest mice, and least terns). Additionally, millions of migrating waterfowl and shorebirds that use this area yearly will be afforded protection in this area. The plan is expected to be completed in 2007. (Margaret Kolar, Service, *in litt.*, May 4, 2004).

*(1) Benefits of Inclusion*

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for the Pacific Coast WSP that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit.

Primary constituent elements in this area would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, as San Francisco Bay is occupied by the Pacific Coast WSP, consultation for activities which may adversely affect the species, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

By including the six San Francisco Bay units in our final critical habitat designations, we could provide those areas with immediate critical habitat protection rather than waiting for the salt pond management plan to be completed in 2007. However, as discussed in the analyses for other excluded units above, the protections provided under section 7 largely overlap with protections resulting from critical habitat designation. Three of the excluded units are on the Don Edwards San Francisco Bay NWR, which is managed by the Service. Any significant changes to salt pond operations within those units would trigger consultation under section 7, as would the completion of the salt pond management plan itself. Two of the units are on land managed by the CDFG, while the final and smallest unit is on land managed by a county governmental agency called the Hayward Area Recreation District (HARD). Both of these agencies are participating with the Service in development of the management plan, and neither would be directly affected by critical habitat designation since they are not Federal agencies. The Service is participating as well in the development of the management plan, making necessary an internal section 7 consultation evaluating the effects of the actions on the plan.

In *Sierra Club* v. *Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the ongoing development of the management plan for these areas.

For 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot,* the Fish and Wildlife Service equated the jeopardy standard with the standard for destruction or adverse modification of critical habitat. However, in *Gifford Pinchot* the court noted the government, by simply considering the action's survival consequences, was reading the concept of recovery out of the regulation. The court, relying on the CFR definition of adverse modification, required the Service to determine whether recovery was adversely affected. The *Gifford Pinchot* decision arguably made it easier to reach an 'adverse modification' finding by reducing the harm, affecting recovery, rather than the survival of the species. However, there is an important distinction: Section 7(a)(2) limits harm to the species either through take or critical habitat. It does not require positive improvements or enhancement of the species status. Thus, any management plan which considers enhancement or recovery as the management standard will almost always provide more benefit than the critical habitat designation.

*(2) Benefits of Exclusion*

By excluding the six units from critical habitat designation, we avoid restricting the flexibility for the development of the salt pond management plan which might otherwise establish habitat managed for plovers in other locations. The six excluded San Francisco Bay units were chosen based on recent high usage of those areas by plovers, although the plovers have demonstrated a willingness to travel relatively large distances within the Bay area to nest wherever habitat is most appropriate (Kolar *in litt.* 2004). Because plover habitat in the area can easily be created or removed in different areas by drying or flooding particular ponds, the management planners currently have the flexibility to move plover habitat to wherever it would be most advantageous in light of the conservation needs of the population and of other threatened and endangered species present in the Bay area. By designating critical habitat according to the current locations of essential habitat features, we would tend to lock the current management scheme into place for the designated units, thereby reducing management flexibility for other listed species and targeted ecosystems.

Additionally, the management planning process is a collaborative effort involving cooperation and input from numerous stakeholders such as landowners, public land managers, and the general public. This allows the best information and local knowledge to be brought to the table, and may encourage a sense of commitment to the Pacific Coast WSPs continuing well-being. We are unable to match this level of public participation in the critical habitat designation process due to time constraints. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future. Finally, the enhancement and management of plover habitat will benefit greatly from coordination between the various owners and managers in the area. The ongoing planning process can provide for that coordination, whereas the critical habitat designation process cannot. Designation of critical habitat would therefore not provide as great a benefit to the species as the positive management measures in a plan.

*(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion*

We find that the Pacific Coast WSP will obtain greater benefits if we avoid designating habitat in the San Francisco Bay and instead allow participating agencies to complete their salt pond management plan unencumbered by critical habitat considerations. While

the salt pond management plan offers considerable benefits in comparison to critical habitat, we must also consider the likelihood that the plan will be completed. In this case we find the likelihood to be high because the major participants are all resource management agencies, and because the management plan is related to the recent purchase (*i.e.*, 16,500 ac (6,677 ha)) of salt ponds from a salt manufacturing company) by the Service and CDFG. This purchase involved the close cooperation of numerous resource management and environmental organizations. Accordingly, we are excluding six units in the south San Francisco Bay from designation.

*(4) Exclusion Will Not Result in Extinction of the Species*

Critical habitat is being designated for the Pacific Coast WSP in other areas that will be accorded the protection from adverse modification by federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* Also the jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process provides assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Additionally, the species occurs on lands protected and managed either explicitly for the species or indirectly through more general objectives to protect natural values. These factors acting in concert with the other protections provided under the Act, lead us to find that exclusion the six south San Francisco units will not result in extinction of the Pacific Coast WSP.

*Relationship of Critical Habitat to Dillon Beach—Exclusions Under Section 4(b)(2) of the Act*

We are excluding unit CA 7 (Dillon Beach) 30 ac (12 ha), at the mouth of Tomales Bay in Marin County, California, under section 4(b)(2) of the Act. Pacific Coast WSP habitat in this region consists primarily of sparsely vegetated sandy beach both above and below the high tide line. Approximately 95 percent of the unit is owned by Lawson's Landing, Inc. (Lawson), which operates a nearby campground. The remainder is owned by Oxfoot Associates, LLC (Oxfoot), which operates a day-use beach with associated parking lot. The location supports wintering plovers, but does not currently support any nesting (Page *in litt.* 2004, Stenzel *in litt.* 2004). Wintering plovers are typically present at the site from July through February. The entire area is subject to moderate use by human pedestrians and unleashed dogs, which enter the beach from both the campground to the south and the day-use beach to the north.

In the period between the proposed designation and the final designation we have been in contact with the landowners and are in the process of developing conservation measures to assist in conserving Pacific Coast WSP and their habitat on Dillon Beach. Although finalization of the conservation measures have not been completed, we expect the measures will be finalized and will benefit Pacific Coast WSP conservation in the area.

*(1) Benefits of Inclusion*

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for the Pacific Coast WSP that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit.

Primary constituent elements in this area would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, as Dillon Beach is occupied by wintering plovers, consultation for activities which may adversely affect the species, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

The inclusion of these 30 ac (12 ha) of non-Federal lands as critical habitat would provide some additional Federal regulatory benefits for the species consistent with the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* However, this additional benefit is likely to be small because the lands are not under Federal ownership and any Federal agency proposing a Federal action on these 30 ac (12 ha) of non-Federal lands would likely consider the conservation value of these lands as identified in the proposed deed restrictions and conservation strategy, and take necessary steps to avoid jeopardy or destruction or adverse modification of critical habitat.

By including the Dillon Beach unit in our final critical habitat designations, we could provide those areas with immediate critical habitat protection rather than waiting for the agreement to be completed. However, as discussed in the analyses for other excluded units above, the protections provided under section 7 largely overlap with protections resulting from critical habitat designation. The Service is participating as well in the development of the conservation measures with the landowners, and as such, evaluating the effects of the actions on the Pacific Coast WSP. Excluding these privately owned lands with conservation strategies from critical habitat may, by way of example, provide positive social, legal, and economic incentives to other non-Federal landowners who own lands that could contribute to listed species recovery if voluntary conservation measures on these lands are implemented.

In *Sierra Club* v. *Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001), the Fifth Circuit Court of Appeals stated that the identification of habitat essential to the conservation of the species can provide informational benefits to the public, State and local governments, scientific organizations, and Federal agencies. The court also noted that heightened public awareness of the plight of listed species and their habitats may facilitate conservation efforts. The additional educational benefits that might arise from critical habitat designation have been largely accomplished through the ongoing development of the management plan for this area.

For 30 years prior to the Ninth Circuit Court's decision in *Gifford Pinchot,* the Fish and Wildlife Service equated the jeopardy standard with the standard for destruction or adverse modification of

critical habitat. However, in *Gifford Pinchot* the court noted the government, by simply considering the action's survival consequences, was reading the concept of recovery out of the regulation. The court, relying on the CFR definition of adverse modification, required the Service to determine whether recovery was adversely affected. The *Gifford Pinchot* decision arguably made it easier to reach an 'adverse modification' finding by reducing the harm, affecting recovery, rather than the survival of the species. However, there is an important distinction: Section 7(a)(2) limits harm to the species either through take or critical habitat. It does not require positive improvements or enhancement of the species status. Thus, any management plan, or in this case proposed deed restriction with accompanying conservation strategy, which considers enhancement or recovery as the management standard will almost always provide more benefit than the critical habitat designation.

*(2) Benefits of Exclusion*

Lawson and Oxfoot (landowners) are working with the Service to place deed restrictions over the 30 ac (12 ha) of privately owned land at Dillon Beach identified as essential habitat. Working with the Service, Lawson is proposing to restrict development and habitat alteration on the 30 ac (12 ha) proposed for critical habitat, while Oxfoot, who controls the major access point to the beach is proposing to construct and maintain interpretive signage visible to beachgoers entering the property. Additionally, the major landowner and the Service are pursuing grant funding by the landowner and the Service to produce additional interpretive signs and flyers, which would be placed in easily visible locations on portions of the property. These conservation measures will protect the wintering plover habitat at Dillon Beach.

The provision restricting development and habitat alteration addresses the general rangewide threat of habitat loss, while the following provisions directly address the threat of disturbance by humans and pets, and indirectly address the threat of predators by encouraging beachgoers to avoid practices that might attract predators, such as leaving trash on the beach. Therefore, designation of critical habitat would not provide as great a benefit to the species as the positive management measures in the proposed plan.

Additionally, the management planning process is a voluntary collaborative effort involving cooperation and input from the landowners and the Service. This cooperation allows the best information and local knowledge to be brought to the table, and may encourage a sense of commitment to the Pacific Coast WSPs continuing well-being. In this case, the landowner has explicitly stated that they would not be willing to work with the Service to conserve the Pacific Coast WSP and implement conservation measures if critical habitat is designated on their property. Finally, the enhancement and management of plover habitat will benefit greatly from coordination between the various owners and managers in the area. The ongoing planning process can provide for that coordination, whereas the critical habitat designation process cannot. Designation of critical habitat would therefore not provide as great a benefit to the species as the positive management measures in a plan. By excluding these lands, we preserve our current partnerships and encourage additional conservation actions in the future.

*(3) The Benefits of Exclusion Outweigh the Benefits of Inclusion*

We have reviewed and evaluated the exclusion of approximately 30 ac (12 ha) from the critical habitat designation for the Pacific Coast WSP. Based on this evaluation, we find that the benefits of exclusion (ensure willingness of existing partners to enact conservation measures, maintain ability to attract new partners) of the lands containing features essential to the conservation of the Pacific Coast WSP within Dillon Beach unit outweigh the benefits of inclusion (limited educational and regulatory benefits) of these lands as critical habitat. Allowing landowners to participate voluntarily to develop and implement management strategies and conservation measures will provide greater benefit to the species than designation of critical habitat alone. However, in weighing the benefits of inclusion versus the benefits of exclusion, the Service must also consider the likelihood that the conservation plan and accompanying deed restrictions will be completed. In this case we find the likelihood to be high because the major participants are all involved in the current process of developing conservation strategies for the Pacific Coast WSP and have voluntarily contacted the Service in the development of such measures. During the period between the proposed designation and the final designation we have been in contact with the local landowners and have established an excellent working relationship with the local landowners and their representative and feel confident that an agreement will be reached in the near future for the conservation of the Pacific Coast WSP and its habitat. Accordingly, we are excluding the Dillon Beach unit from the designation.

*(4) Exclusion Will Not Result in Extinction of the Species*

We believe that exclusion of these 30 ac (12 ha) of non-Federal lands will not result in extinction of the Pacific Coast WSP since these lands are proposed to be conserved and managed under deed restriction and an accompanying conservation strategy. Additionally, critical habitat is being designated for the Pacific Coast WSP in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot*. Also the jeopardy standard of section 7 and routine implementation of habitat conservation through the section 7 process provides assurances that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Additionally, the species occurs on lands protected and managed either explicitly for the species or indirectly through more general objectives to protect natural values. These factors acting in concert with the other protections provided under the Act, lead us to find that exclusion of the 30 ac (12 ha) Dillon Beach unit would not result in extinction of the Pacific Coast WSP.

*Relationship of Critical Habitat to Economic Impacts—Exclusions Under Section 4(b)(2) of the Act*

This section allows the Secretary to exclude areas from critical habitat for economic reasons if she determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat, unless the exclusion will result in the extinction of the species concerned. This is a discretionary authority Congress has provided to the Secretary with respect to critical habitat. Although economic and other impacts may not be considered when listing a species, Congress has expressly required their consideration when designating critical habitat.

In general, we have considered in making the following exclusions that all of the costs and other impacts predicted in the economic analysis may not be avoided by excluding the area, due to

the fact that all of the areas in question are currently occupied by the Pacific Coast WSP requirements for consultation under Section 7 of the Act, or for permits under section 10 (henceforth ''consultation''), for any take of this species, which should also serve to protect the species and its habitat, and other protections for the species exist elsewhere in the Act and under State and local laws and regulations. In conducting economic analyses, we are guided by the 10th Circuit Court of Appeal's ruling in the New Mexico Cattle Growers Association case (248 F.3d at 1285), which directed us to consider all impacts, ''regardless of whether those impacts are attributable co-extensively to other causes.'' As explained in the analysis, due to possible overlapping regulatory schemes and other reasons, there are also some elements of the analysis that may overstate some costs.

Conversely, the Ninth Circuit has recently ruled (''Gifford Pinchot'', 378 F.3d at 1071) that the Service's regulations defining ''adverse modification'' of critical habitat are invalid because they define adverse modification as affecting both survival and recovery of a species. The Court directed us to consider that determinations of adverse modification should be focused on impacts to recovery. While we have not yet proposed a new definition for public review and comment, compliance with the Court's direction may result in additional costs associated with the designation of critical habitat (depending upon the outcome of the rulemaking). In light of the uncertainty concerning the regulatory definition of adverse modification, our current methodological approach to conducting economic analyses of our critical habitat designations is to consider all conservation-related costs. This approach would include costs related to sections 4, 7, 9, and 10 of the Act, and should encompass costs that would be considered and evaluated in light of the *Gifford Pinchot* ruling.

We are excluding all or portions of six units or subunits of the proposed critical habitat for economic reasons. Congress expressly contemplated that exclusions under this section might result in such situations when it enacted the exclusion authority. House Report 95–1625, stated on page 17: ''Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat * * * In some situations, no critical habitat would be specified. In such situations, the Act would still be in force preventing any taking or other prohibited act * * *'' (emphasis supplied). We accordingly believe that these exclusions, and the basis upon which they are made, are fully within the parameters for the use of section 4(b)(2) set out by Congress. In reaching our decision about which areas should be excluded from the final critical habitat designation for economic reasons, we considered the following factors to be important: (1) The units (or subunits) with the highest cost; (2) a substantial break in costs from one unit (or subunit) to the next that may indicate disproportionate impacts; and (3) possible cost impacts to public works projects such as transportation or other infrastructure from the designation.

The draft economic analysis published in the **Federal Register** on August 16, 2005 (70 FR 48094) analyzed the economic effects of the proposed critical habitat designation for the Pacific Coast WSP in the States of Washington, Oregon, and California. The economic impacts of critical habitat designation vary widely between States, among counties, and even within counties. The counties most impacted by the critical habitat designation to the recreation and tourist industry are all located in either central or southern California, and include Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, and San Diego counties. Further, economic impacts are unevenly distributed within counties. The analysis was conducted at the proposed unit or subunit level. The subunits with the greatest economic impacts include Vandenberg South (CA 17B), Atascadero Beach (CA 15B), Vandenberg North (CA 17A), Silver Strand (CA 27C), Jetty Road to Aptos (CA 12A), Morro Bay Beach (CA 15C), Pismo Beach/Nipomo (CA 16), and Monterey to Moss Landing (CA 12C). These 8 subunits make up approximately 90 percent of the total costs of designation. Vandenberg North (CA 17A) and Vandenberg South (CA 17B) are excluded under section 4(b)(2) of the Act based on National Security concerns by the Air Force. Portions of Silver Strand (CA 27C) are exempt from this critical habitat designation under section 4(a)(3) of the Act. For a discussion of these exclusions and exemptions see the Relationship of Critical Habitat to Military Lands—Application of Section 4(a)(3) and Exclusions Under Section 4(b)(2) section. Had these units not already been excluded or exempted, they likely would have been excluded for economic reasons.

Mitigation requirements increase the cost of development and avoidance requirements are assumed to reduce coastal recreational opportunities and the quality of visits, thereby affecting the amount of localized tourism. Adverse impacts to coastal recreation and tourism are estimated to be 95 percent of the costs associated with this critical habitat designation for the Pacific Coast WSP. Management activities designed to enhance plover conservation accounts for approximately 3.3 percent of designation costs, while impacts to military operations (1.4 percent), development (0.2 percent) and gravel mining (0.1 percent) were also estimated. The total future costs (from 2005 to 2025) at the proposed critical habitat units are estimated to be $272.8 million to $645.3 million on a present value basis ($514.9 to $1,222.7 million expressed in constant dollars). Costs attributed to lost or diminished recreation and tourism ranges from $244.4 million to $611.1 million. Future costs to the military resulting from the designation would be approximately $9.1 million in present value terms, plus adverse impacts to military readiness and national security that are not monetized.

A copy of the final economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section).

**Economic Exclusions**

We have considered, but are excluding from critical habitat for the Pacific Coast WSP essential habitat in the six subunits and counties listed in Table 3.

TABLE 3.—EXCLUDED SUBUNITS AND ESTIMATED COSTS

| Unit or subunit | County | Economic impact in draft EA ($) |
|---|---|---|
| CA 12A: Jetty Rd.—Aptos | Santa Cruz and Monterey | 48,563,000 |
| CA 12C: Monterey—Moss Landing | Monterey | 210,378,000 |
| CA 15B: Atascadero Beach | San Luis Obispo | 31,395,000 |
| CA 15C: Morro Bay Beach | San Luis Obispo | 73,584,000 |
| CA 16: Pismo Beach/Nipomo | San Luis Obispo and Santa Barbara | 109,309,000 |
| CA 27C: Silver Strand | San Diego | 43,714,000 |
| Total | | 516,943,000 |

The notice of availability of the draft economic analysis (70 FR 48094: August 16, 2005) solicited public comment on the potential exclusion of high cost areas. As we finalized the economic analysis, we identified high costs associated with the proposed critical habitat designation throughout the range of the Pacific Coast WSP. Costs related to conservation activities for the proposed Pacific Coast WSP critical habitat pursuant to sections 4, 7, and 10 of the Act are estimated to be $272.8 to $645.3 million over the next 20 years on a present value basis. In constant dollars, the draft economic analysis estimates there will be an economic impact of $514.9 to $1,22.7 million expressed in constant dollars over the next 20 years. The activities affected by plover conservation may include recreation, plover management, real estate development, military base operations, and gravel extraction. Ninety percent of all future costs are associated with 8 central and southern California units identified above (Table 3). On the basis of the significance of these costs, we determined that these warrant exclusion from designation.

*(1) Benefits to Inclusion of the Six Excluded Units or Subunits*

The primary benefit of including an area within a critical habitat designation is the protection provided by section 7(a)(2) of the Act that directs Federal agencies to ensure that their actions do not result in the destruction or adverse modification of critical habitat. The designation of critical habitat may provide a different level of protection under section 7(a)(2) of the Act for the Pacific Coast WSP that is separate from the obligation of a Federal agency to ensure that their actions are not likely to jeopardize the continued existence of the endangered species. Under the *Gifford Pinchot* decision, critical habitat designations may provide greater benefits to the recovery of a species than was previously believed, but it is not possible to quantify this benefit at present. However, the protection provided is still a limitation on the harm that occurs as opposed to a requirement to provide a conservation benefit.

The area excluded as critical habitat is currently occupied by the species. If this area were designated as critical habitat, any actions with a Federal nexus which might adversely affect the critical habitat would require a consultation with us, as explained previously, in Effects of Critical Habitat Designation section. However, inasmuch as this area is currently occupied by the species, consultation for Federal activities which might adversely impact the species or would result in take would be required even without the critical habitat designation. Primary constituent elements in this area would be protected from destruction or adverse modification by federal actions using a conservation standard based on the Ninth Circuit Court's decision in *Gifford Pinchot.* This requirement would be in addition to the requirement that proposed Federal actions avoid likely jeopardy to the species' continued existence. However, as all six units are occupied by the Pacific Coast WSP, consultation for activities which may adversely affect the species, including possibly significant habitat modification (see definition of ''harm'' at 50 CFR 17.3), would be required, even without the critical habitat designation. The requirement to conduct such consultation would occur regardless of whether the authorization for incidental take occurs under either section 7 or section 10 of the Act.

We determined, however, in the economic analysis that designation of critical habitat could result in up to $645.3 million in costs, the majority of which are related to recreational and tourism impacts. We believe that the potential decrease in coastal recreation and associated tourism resulting from this designation of critical habitat for the Pacific Coast WSP, would minimize impacts to and potentially provide some protection to the species, the sandy beach, river gravel bar, and evaporation pond habitats where they reside, and the physical and biological features essential to the species' conservation (*i.e.*, the primary constituent elements). Thus, this decrease in recreation and tourism would directly translate into a potential benefit to the species that would result from this designation.

Another possible benefit of a critical habitat designation is education of landowners and the public regarding the potential conservation value of these areas. This may focus and contribute to conservation efforts by other parties by clearly delineating areas of high conservation values for certain species. However, we believe that this education benefit has largely been achieved, or is being achieved in equal measure by other means. Although we have not completed the recovery planning process for the Pacific Coast WSP, the designation of critical habitat would assist in the identification of potential core recovery areas for the species. The critical habitat designation and the current draft recovery plan provide information geared to the general public, landowners, and agencies about areas that are important for the conservation of the species and what actions they can implement to further the conservation of the Pacific Coast WSP within their own jurisdiction and capabilities, and contains provisions for ongoing public outreach and education as part of the recovery process.

In summary, we believe that inclusion of the six subunits as critical habitat would provide some additional Federal regulatory benefits for the species. However, that benefit is limited to some degree by the fact that the designated critical habitat is occupied by the species, and therefore there must, in any case, be consultation with the Service over any Federal action which may affect the species in those six units. The additional educational benefits which might arise from critical habitat designation are largely accomplished through the multiple opportunities for public notice and comments which

accompanied the development of this regulation, publicity over the prior litigation, and public outreach associated with the development of the draft and, ultimately, the implementation of the final recovery plan for the Pacific Coast WSP.

*(2) Benefits to Exclusion of the Six Excluded Units or Subunits*

The economic analysis conducted for this proposal estimates that the costs associated with designating these six subunits would be approximately $645.3 million. Estimated costs would be associated with the Pacific Coast WSP in amounts shown in Table 3 above. By excluding these subunits, some or all of these costs will be avoided.

*(3) Benefits of Exclusion Outweigh the Benefits of Inclusion of the Six Units or Subunits*

We believe that the benefits from excluding these lands from the designation of critical habitat—avoiding the potential economic and human costs, both in dollars and jobs, predicted in the economic analysis— exceed the educational and regulatory benefits which could result from including those lands in this designation of critical habitat.

We have evaluated and considered the potential economic costs on the recreation and tourism industry relative to the potential benefit for the Pacific Coast WSP and its primary constituent elements derived from the designation of critical habitat. We believe that the potential economic impact of up to approximately $645.3 million on the tourism industry significantly outweighs the potential conservation and protective benefits for the species and their primary constituent elements derived from the residential development not being constructed as a result of this designation.

We also believe that excluding these lands, and thus helping landowners avoid the additional costs that would result from the designation, will contribute to a more positive climate for Habitat Conservation Plans and other active conservation measures which provide greater conservation benefits than would result from designation of critical habitat '' even in the post-*Gifford Pinchot* environment—which requires only that the there be no adverse modification resulting from actions with a Federal nexus. We therefore find that the benefits of excluding these areas from this designation of critical habitat outweigh the benefits of including them in the designation.

We believe that the required future recovery planning process would provide at least equivalent value to the public, State and local governments, scientific organizations, and Federal agencies in providing information about habitat that contains those features considered essential to the conservation of the Pacific Coast WSP, and in facilitating conservation efforts through heightened public awareness of the plight of the listed species. The draft recovery plan contains explicit objectives for ongoing public education, outreach, and collaboration at local, state, and federal levels, and between the private and public sectors, in recovering the Pacific Coast WSP.

*(4) Exclusion Will Not Result in Extinction of the Species*

We believe that exclusion of these lands will not result in the extinction of the Pacific Coast WSP as these areas are considered occupied habitat. Actions which might adversely affect the species are expected to have a Federal nexus, and would thus undergo a section 7 consultation with the Service. The jeopardy standard of section 7, and routine implementation of habitat preservation through the section 7 process, as discussed in the economic analysis, provide assurance that the species will not go extinct. In addition, the species is protected from take under section 9 of the Act. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the species in other areas that will be accorded the protection from adverse modification by Federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot.* Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this provides protection from extinction while conservation measures are being implemented. For example, the Pacific Coast WSP is protected on lands such as State and National Parks, and are managed specifically for the species *e.g.*, Point Reyes National Seashore. The species also occurs on lands managed to protect and enhance coastal ecosystems and wetlands, *e.g.* Moss Landing Wildlife Area and the San Francisco Bay National Wildlife Refuge Complex.

We believe that exclusion of the six subunits will not result in extinction of the Pacific Coast WSP as they are considered occupied habitat. Federal Actions which might adversely affect the species would thus undergo a consultation with the Service under the requirements of section 7 of the Act. The jeopardy standard of section 7, and routine implementation of habitat preservation as part of the section 7 process, as discussed in the draft economic analysis, provide insurance that the species will not go extinct. The exclusion leaves these protections unchanged from those that would exist if the excluded areas were designated as critical habitat.

Critical habitat is being designated for the Pacific Coast WSP in other areas that will be accorded the protection from adverse modification by federal actions using the conservation standard based on the Ninth Circuit decision in *Gifford Pinchot.* Additionally, the species occurs on lands protected and managed either explicitly for the species, or indirectly through more general objectives to protect natural values, this factor acting in concert with the other protections provided under the Act for these lands absent designation of critical habitat on them, and acting in concert with protections afforded each species by the remaining critical habitat designation for the species, lead us to find that exclusion of these six subunits will not result in extinction of the Pacific Coast WSP.

*Economic Analysis*

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of Specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species concerned.

Following the publication of the proposed critical habitat designation, we conducted an economic analysis to estimate the potential economic effect of the designation. The draft analysis was made available for public review on August 16, 2005 (70 FR 48094). We accepted comments on the draft analysis until September 15, 2005.

The primary purpose of the economic analysis is to estimate the potential economic impacts associated with the designation of critical habitat for the Pacific Coast WSP. This information is intended to assist the Secretary in making decisions about whether the benefits of excluding particular areas from the designation outweigh the

benefits of including those areas in the designation. This economic analysis considers the economic efficiency effects that may result from the designation, including habitat protections that may be co-extensive with the listing of the species. It also addresses distribution of impacts, including an assessment of the potential effects on small entities and the energy industry. This information can be used by the Secretary to assess whether the effects of the designation might unduly burden a particular group or economic sector.

This analysis focuses on the direct and indirect costs of the rule. However, economic impacts to land use activities can exist in the absence of critical habitat. These impacts may result from, for example, local zoning laws, State and natural resource laws, and enforceable management plans and best management practices applied by other State and Federal agencies. Economic impacts that result from these types of protections are not included in the analysis as they are considered to be part of the regulatory and policy baseline.

A copy of the final economic analysis with supporting documents are included in our administrative record and may be obtained by contacting U.S. Fish and Wildlife Service, Branch of Endangered Species (see **ADDRESSES** section) or for downloading from the Internet at *http://www.fws.gov/pacific/sacramento/default.htm.*

*Clarity of the Rule*

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this final rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the final rule clearly stated? (2) Does the final rule contain technical jargon that interferes with the clarity? (3) Does the format of the final rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the final rule? (5) What else could we do to make this final rule easier to understand?

Send a copy of any comments on how we could make this final rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: *Exsec@ios.doi.gov.*

**Required Determinations**

*Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of $100 million or more or adversely affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. As explained above, we prepared an economic analysis of this action. We used this analysis to meet the requirement of section 4(b)(2) of the Act to determine the economic consequences of designating the specific areas as critical habitat. We also used it to help determine whether to exclude specific areas as critical habitat, as provided for under section 4(b)(2), if we determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless we determine, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA) (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA also amended the RFA to require a certification statement.

Small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect Pacific Coast WSP. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate

consultation for ongoing Federal activities.

To determine if the proposed designation of critical habitat for the Pacific coast population of the western snowy plover would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, recreation, residential and related development, and commercial gravel mining). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted or authorized by Federal agencies; non-Federal activities are not affected by the designation.

In our economic analysis of this proposed designation, we evaluated the potential economic effects on small business entities and small governments resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. We evaluated small business entities in five categories: Habitat and plover management activities, beach-related recreation activities, residential and related development, activities on military lands, and commercial mining. Of these five categories, impacts of plover conservation to habitat and plover management, and activities on military lands are not anticipated to affect small entities as discussed in Appendix A of our draft economic analysis. The following summary of the information contained in Appendix A of the draft economic analysis provides the basis for our determination.

On the basis of our analysis of western snowy plover conservation measures, we determined that this designation of critical habitat for the western snowy plover would result in potential economic effects to recreation. Section 4 of the draft economic analysis discusses impacts of restrictions on recreational activity at beaches containing potential critical habitat for the plover. Individual recreators may experience welfare losses as a result of foregone or diminished trips to the beach. If fewer trips are taken by recreators, then some local businesses serving these visitors may be indirectly affected. In our August 16, 2005, notice of availability on the draft economic analysis and proposed rule (70 FR 48094), we did not believe that this proposed designation would have an effect on a substantial number of small businesses and would also not result in a significant effect to impacted small businesses. In this final rule, we have excluded 8 units (Vandenberg South (CA 17B), Atascadero Beach (CA 15B), Vandenberg North (CA 17A), Silver Strand (CA 27C), Jetty Road to Aptos (CA 12A), Morro Bay Beach (CA 15C), Pismo Beach/Nipomo (CA 16), and Monterey to Moss Landing (CA 12C)) that contained approximately 90 percent of the economic impacts of the proposed designation; approximately 95 percent of the economic impacts are due to impacts to recreations. Because we have excluded these 8 units, this further confirms that this designation will not have an effect on a substantial number of small businesses and would also not result in a significant effect to impacted small businesses.

For development activities, a detailed analysis of impacts to these activities is presented in Section 5 of the draft economic analysis. For this analysis, we determined that two development projects occurring within the potential critical habitat are expected to incur costs associated with plover conservation efforts. One of these projects is funded by Humboldt County, which does not qualify as a small government, and is therefore not relevant to this small business analysis. The economic impact to the one project that qualifies as a small business is estimated to be 2.5 percent of the tax revenue. Because only one small business is estimated to be impacted by this proposal and only 2.5 percent of revenues are estimated to be incurred, we have determined that this designation will not have an effect on a substantial number of small businesses.

For gravel mining activities, we have determined that five gravel mining companies exist within Unit CA–4D of the proposed designation of critical habitat. We determined that the annualized impact from plover conservation activities to these small businesses was approximately 0.5 percent of the total sales of these five mining companies. From this analysis, we have determined that this designation would also not result in a significant effect to the annual sales of these small businesses impacted by this designation.

Based on this data we have determined that this final designation would not affect a substantial number of small businesses involved in recreation, residential and related development and commercial gravel mining. Further, we have determined that this final designation would also not result in a significant effect to the annual sales of those small businesses impacted by this designation. As such, we are certifying that this final designation of critical habitat would not result in a significant economic impact on a substantial number of small entities. Please refer to Appendix A of our economic analysis of this designation for a more detailed discussion of potential economic impacts to small business entities.

In general, two different mechanisms in section 7 consultations could lead to additional regulatory requirements for the approximately four small businesses, on average, that may be required to consult with us each year regarding their project's impact on Pacific Coast WSP and its habitat. First, if we conclude, in a biological opinion, that a proposed action is likely to jeopardize the continued existence of a species or adversely modify its critical habitat, we can offer ''reasonable and prudent alternatives.'' Reasonable and prudent alternatives are alternative actions that can be implemented in a manner consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that would avoid jeopardizing the continued existence of listed species or result in adverse modification of critical habitat. A Federal agency and an applicant may elect to implement a reasonable and prudent alternative associated with a biological opinion that has found jeopardy or adverse modification of critical habitat. An agency or applicant could alternatively choose to seek an exemption from the requirements of the Act or proceed without implementing the reasonable and prudent alternative. However, unless an exemption were obtained, the Federal agency or applicant would be at risk of violating section 7(a)(2) of the Act if it chose to proceed without implementing the reasonable and prudent alternatives.

Second, if we find that a proposed action is not likely to jeopardize the continued existence of a listed animal or plant species, we may identify reasonable and prudent measures designed to minimize the amount or extent of take and require the Federal agency or applicant to implement such measures through non-discretionary terms and conditions. We may also identify discretionary conservation recommendations designed to minimize or avoid the adverse effects of a proposed action on listed species or critical habitat, help implement recovery plans, or to develop information that could contribute to the recovery of the species.

Based on our experience with consultations pursuant to section 7 of the Act for all listed species, virtually all projects—including those that, in their initial proposed form, would result in jeopardy or adverse modification determinations in section 7 consultations—can be implemented successfully with, at most, the adoption of reasonable and prudent alternatives. These measures, by definition, must be economically feasible and within the scope of authority of the Federal agency involved in the consultation. We can only describe the general kinds of actions that may be identified in future reasonable and prudent alternatives. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and this critical habitat designation. Within the final CHUs, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Actions and management efforts affecting Pacific Coast WSP on Federal lands such as national seashores, parks, and wildlife reserves;

(2) Dredging and dredge spoil placement activities that permanently remove PCEs to the extent that essential biological function of plover habitat is adversely affected;

(3) Construction and maintenance of eroded areas or structures (*e.g.*, roads, walkways, marinas, salt ponds, access points, bridges, culverts) which interfere with plover nesting, breeding, or foraging; produce increases in predation; or promote a dense growth of vegetation that precludes an area's use by plovers;

(4) Stormwater and wastewater discharge from communities; and,

(5) Flood control actions that change the PCEs to the extent that the habitat no longer contributes to the conservation of the species.

It is likely that a developer or other project proponent could modify a project or take measures to protect Pacific Coast WSP. The kinds of actions that may be included if future reasonable and prudent alternatives become necessary include conservation set-asides, predator reduction activities, symbolic fencing to reduce human impacts to breeding areas, management of nonnative species, restoration of degraded habitat, and regular monitoring. These are based on our understanding of the needs of the species and the threats it faces, as described in the final listing rule and proposed critical habitat designation. These measures are not likely to result in a significant economic impact to project proponents.

In summary, we have considered whether this would result in a significant economic effect on a substantial number of small entities. We have determined, for the above reasons and based on currently available information, that it is not likely to affect a substantial number of small entities. Federal involvement, and thus section 7 consultations, would be limited to a subset of the area designated. The most likely Federal involvement could include Corps permits, permits we may issue under section 10(a)(1)(B) of the Act, FHA funding for road improvements, and regulation of recreation by the Park Service and BLM. A regulatory flexibility analysis is not required.

*Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2))*

Under the SBREFA, this rule is not a major rule. Our detailed assessment of the economic effects of this designation is described in the economic analysis. Based on the effects identified in the economic analysis, we determined that this rule will not have an annual effect on the economy of $100 million or more, will not cause a major increase in costs or prices for consumers, and will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

*Executive Order 13211*

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule to designated critical habitat for the Pacific Coast WSP is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

*Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or Tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority, ''if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.''

(b) The economic analysis discusses potential impacts of critical habitat designation for the western snowy plover including administrative costs, water management activities, oil and gas activities, concentrated animal feeding operations, agriculture, and transportation. The analysis estimates that costs of the rule could range from $272.8 to $645.3 million over the next 20 years. In constant dollars, the draft economic analysis estimates there will be an economic impact of $514.9 to $1,222.7 million over the next 20 years. In this final rule, we have excluded 8 units (Vandenberg South (CA 17B), Atascadero Beach (CA 15B), Vandenberg North (CA 17A), Silver Strand (CA 27C), Jetty Road to Aptos (CA 12A), Morro Bay Beach (CA 15C), Pismo Beach/ Nipomo (CA 16), and Monterey to Moss Landing (CA 12C)) that contained approximately 90 percent of the economic impacts of the proposed designation. Recreational activities are expected to experience the greatest economic impacts related to western snowy plover conservation activities,

although those impacts are going to be greatly diminished as a result of our exclusions pursuant to section 4(b)(2) of the Act. Impacts on small governments are not anticipated. Furthermore, any costs to recreators would not be expected to be passed on to entities that qualify as small governments. Consequently, for the reasons discussed above, we do not believe that the designation of critical habitat for the western snowy plover will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) Due to current public knowledge of the species' protection, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that this rule will significantly or uniquely affect small governments. As such, Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

*Federalism*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in California, Oregon and Washington. The designation of critical habitat in areas currently occupied by the Pacific Coast WSP habitat imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

*Civil Justice Reform*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Pacific Coast WSP.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996). This final determination does not constitute a major Federal action significantly affecting the quality of the human environment.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands essential for the conservation of the Pacific Coast WSP. Therefore, designation of critical habitat for the Pacific Coast WSP has not been designated on Tribal lands.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Arcata Fish and Wildlife Office (see **ADDRESSES** section).

**Author(s)**

The primary author of this package is the Arcata Fish and Wildlife Office staff (*see* **ADDRESSES** section).

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Regulation Promulgation**

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

## PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.95(b), revise the entry for ''Western Snowy Plover (*Charadrius alexandrinus nivosus*)—Pacific coast population'' to read as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

* * * * *

(b) *Birds.*

* * * * *

Western Snowy Plover (*Charadrius alexandrinus nivosus*)—Pacific Coast Population

(1) Critical habitat units are depicted on the maps below for the following States and counties:

(i) Washington: Grays Harbor and Pacific counties;

(ii) Oregon: Coos, Curry, Douglas, Lane, and Tillamook counties; and

(iii) California: Del Norte, Humboldt, Los Angeles, Marin, Mendocino, Monterey, Orange, San Diego, San Luis Obispo, San Mateo, Santa Barbara, Santa Cruz, and Ventura counties.

(2) The primary constituent elements of critical habitat for the pacific coast population of western snowy plover are the habitat components that provide:

(i) Sparsely vegetated areas above daily high tides (such as sandy beaches, dune systems immediately inland of an active beach face, salt flats, seasonally exposed gravel bars, dredge spoil sites, artificial salt ponds and adjoining levees) that are relatively undisturbed by the presence of humans, pets, vehicles or human-attracted predators (essential for reproduction, food, shelter from predators, protection from disturbance, and space for growth and normal behavior);

(ii) Sparsely vegetated sandy beach, mud flats, gravel bars or artificial salt ponds subject to daily tidal inundation, but not currently under water, that support small invertebrates (essential for food); and

(iii) Surf or tide-cast organic debris such as seaweed or driftwood (essential to support small invertebrates for food, and to provide shelter from predators and weather for reproduction).

(3) Critical habitat does not include existing features and structures, such as buildings, paved areas, boat ramps, and other developed areas, not containing one or more of the primary constituent elements. Any such structures that were inside the boundaries of a critical habitat unit at the time it was designated are not critical habitat. The land on which such structures directly sit is also not critical habitat, as long as the structures remain in place.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of USGS 7.5′ quadrangles, and critical habitat units were then mapped using Universal Transverse Mercatur, North American Datum 1927 (UTM NAD 27) coordinates. These coordinates establish the vertices and endpoints of the landward bounds of the units. Other bounds are established descriptively according to compass headings and the position of the mean low waterline (MLW). For purposes of estimating unit sizes, we approximated MLW in California using the most recent GIS projection of mean high water (MHW). We chose MHW both because it is the only approximation of the coastline currently available in GIS format. We were unable to obtain recent GIS maps of MHW or MLW for Oregon and Washington; therefore, we approximated MLW for units in those States based on aerial photographs.

(5) *Exclusions from the critical habitat designation.* Certain geographic areas are excluded from the critical habitat designation as described below in this paragraph (5).

(i) *Exclusions under sections 3(5)(A) and 4(b)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).* Vandenberg Air Force Base, San Diego Multiple Species Conservation Program, six units bordering the south San Francisco Bay totaling 1,847 ac (747.4 ha), Dillon Beach (Unit CA 7), Vandenberg South (CA 17B), Atascadero Beach (CA 15B), Vandenberg North (CA 17A), Silver Strand (CA 27C), Jetty Road to Aptos (CA 12A), Morro Bay Beach (CA 15C), Pismo Beach/Nipomo (CA 16), and Monterey to Moss Landing (CA 12C).

(ii) [*Reserved*].

(6) **Note:** Maps M1–M4 (index maps) follow:

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**Figure M-1.** Western Snowy Plover Proposed Critical Habitat, Washington.

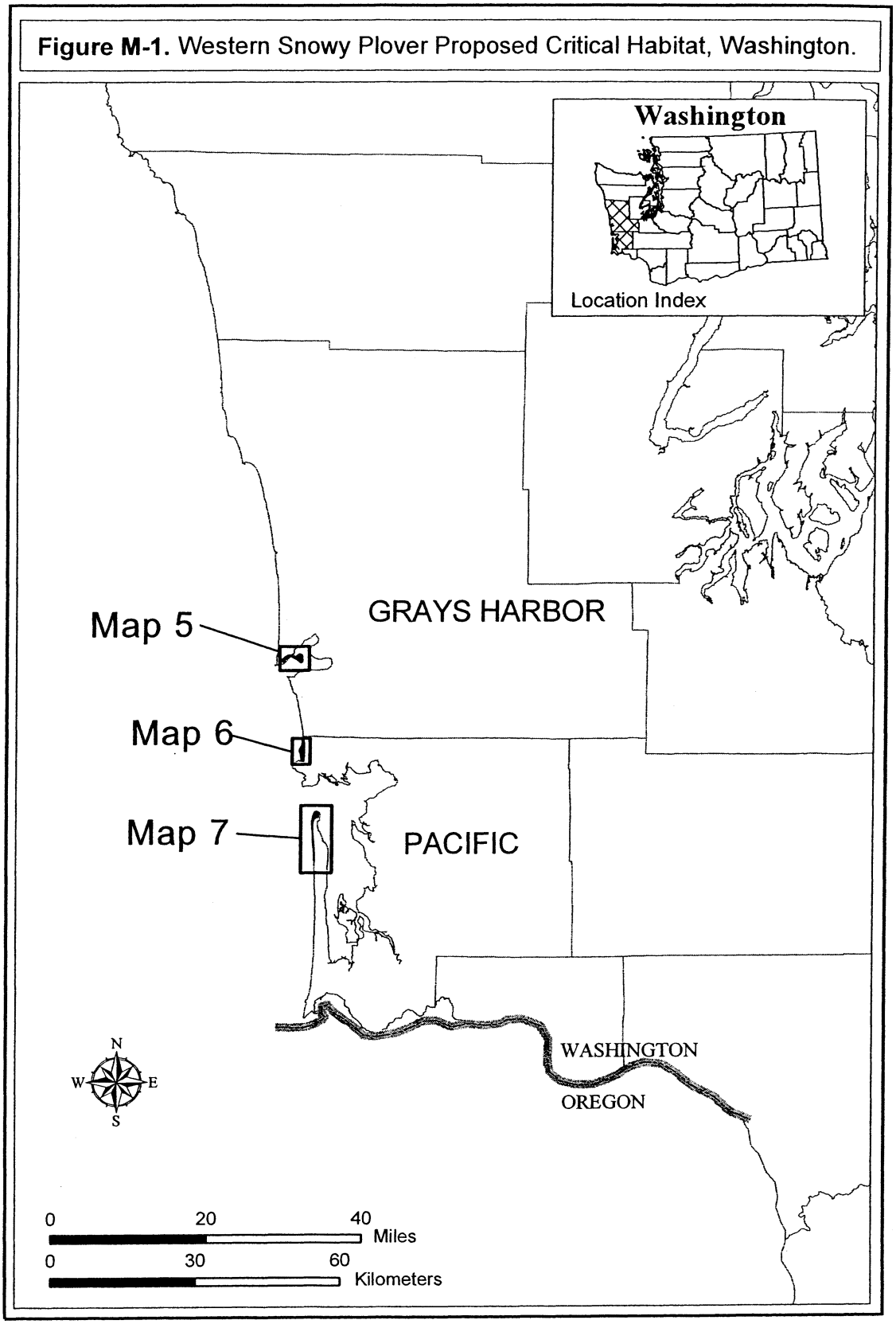


**Figure M-2.** Western Snowy Plover Proposed Critical Habitat, Oregon.

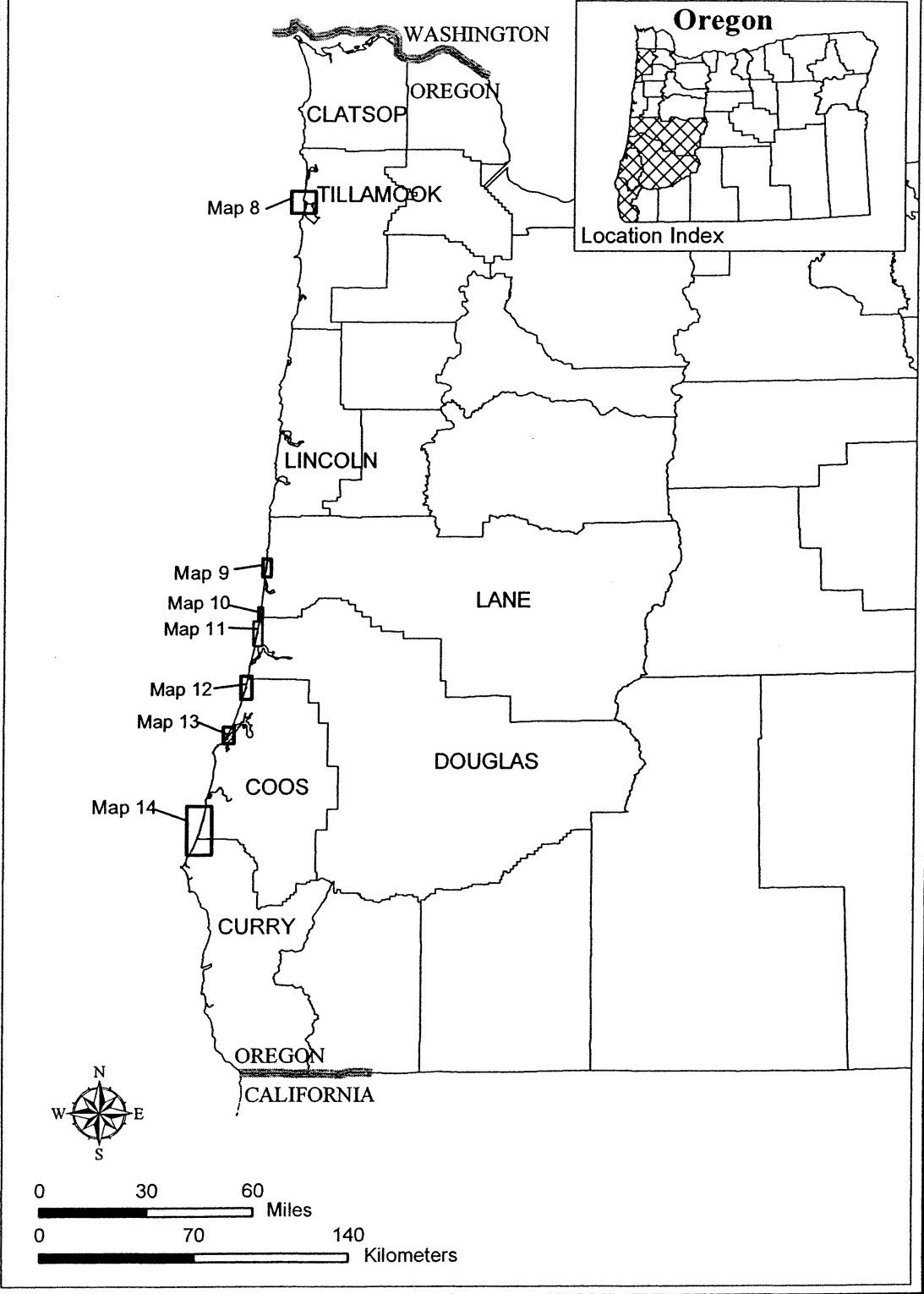


**Figure M-3.** Western Snowy Plover Proposed Critical Habitat, Northern California.

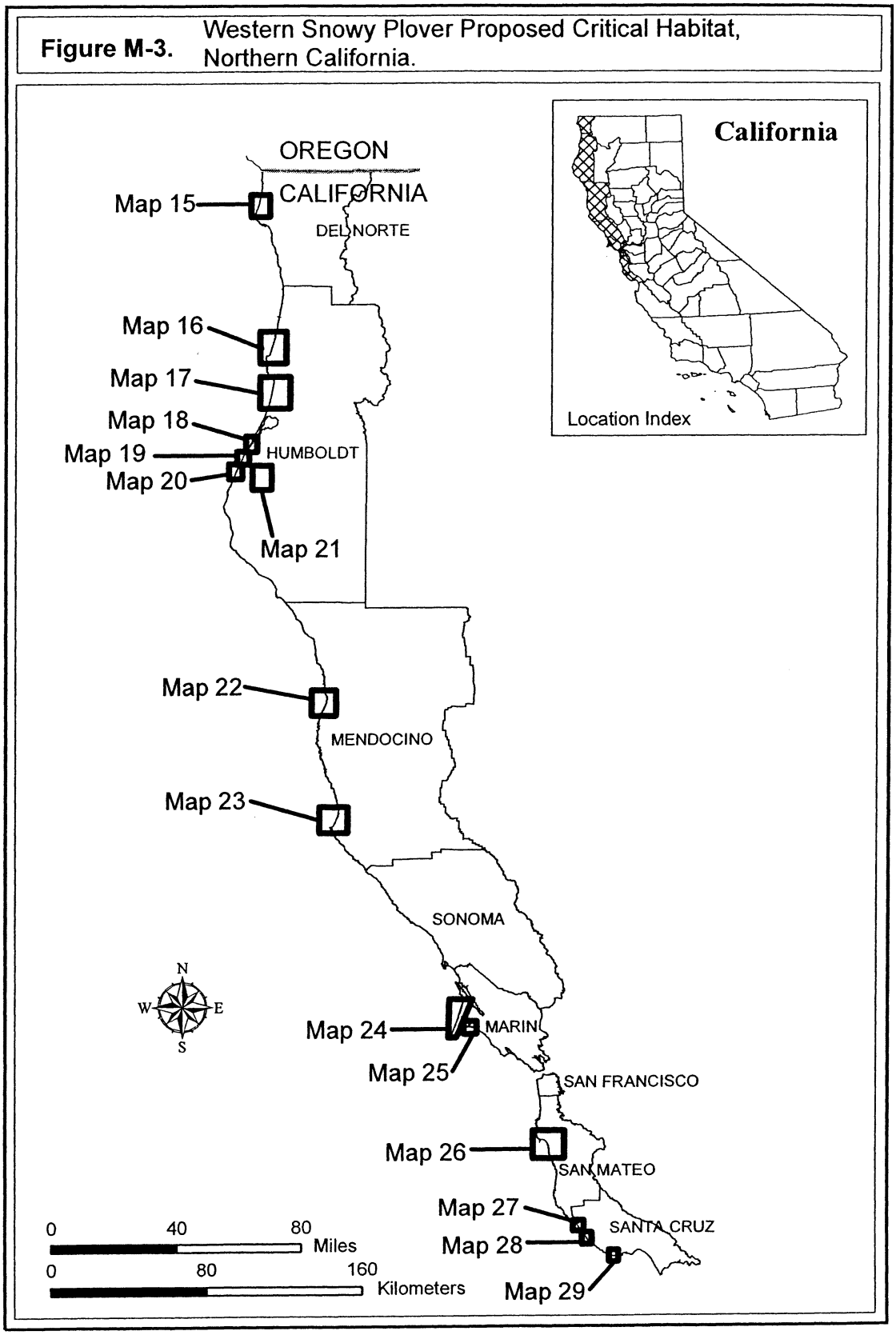
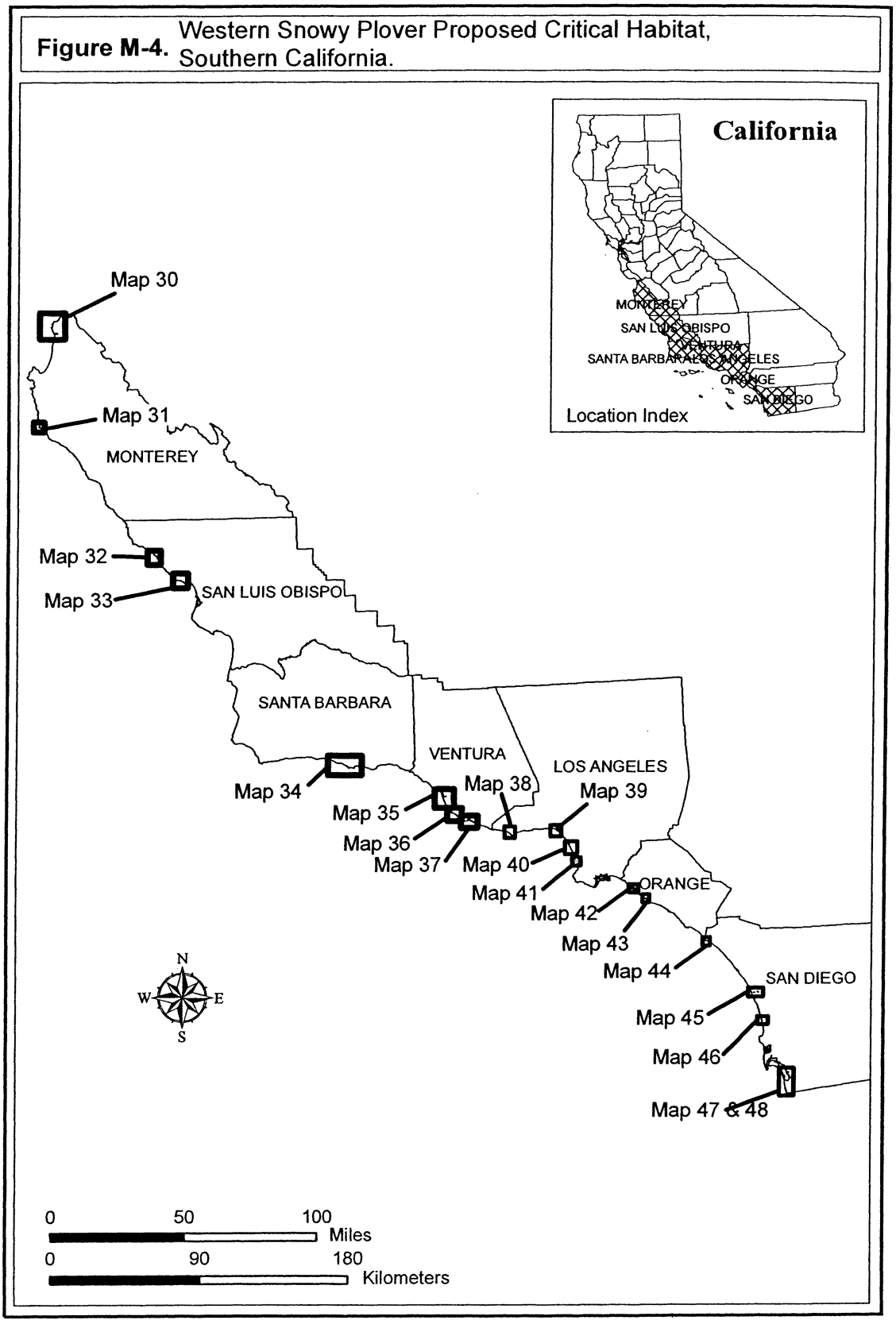


**Figure M-4.** Western Snowy Plover Proposed Critical Habitat, Southern California.

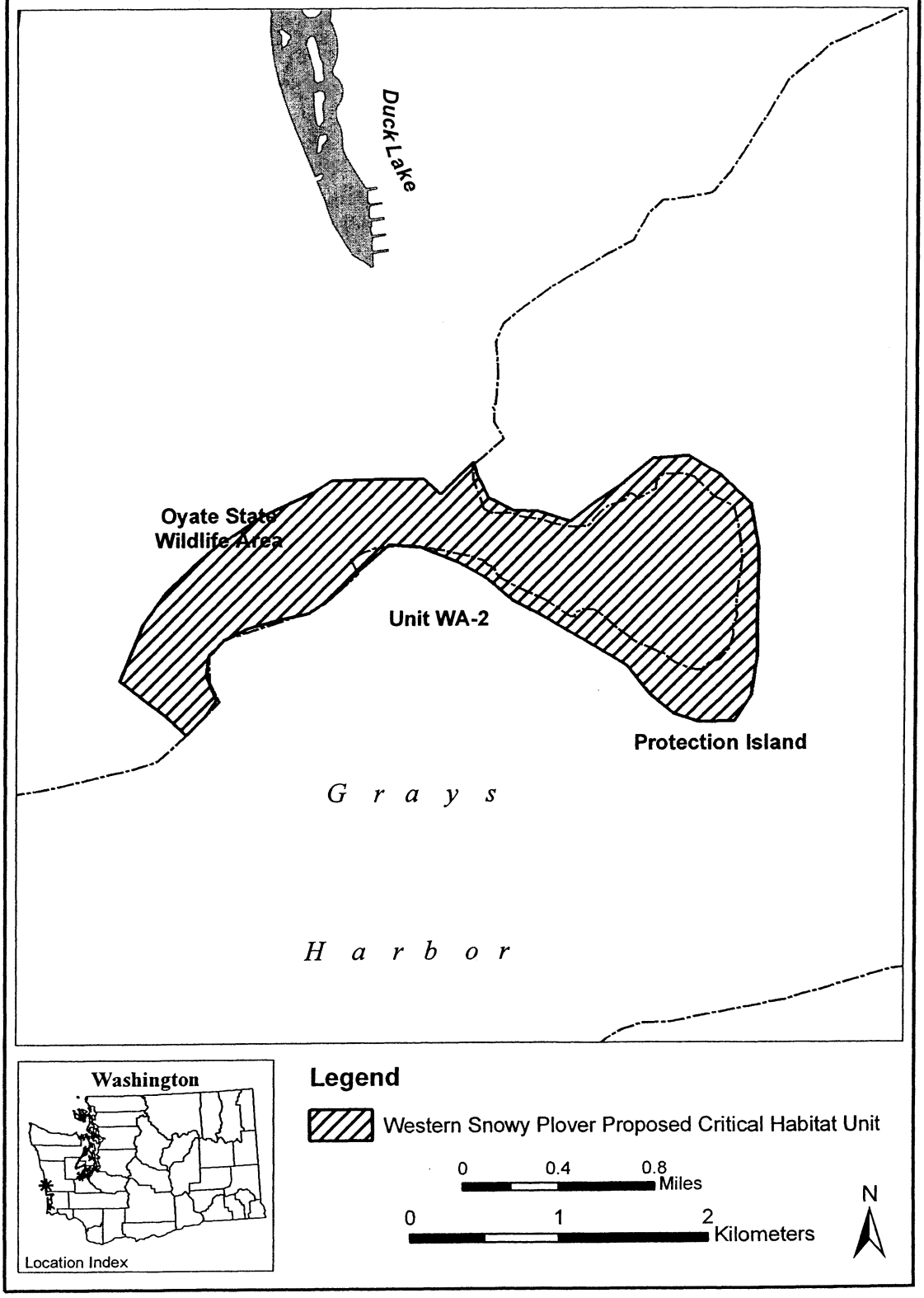


(7) Unit WA 2, Gray's Harbor County, Washington.

(i) From USGS 1:24,000 quadrangle maps West Port, and Point Brown, Washington, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 411969, 5198743; 412118, 5198955; 412321, 5199143; 412474, 5199276; 412581, 5199342; 412760, 5199464; 412914, 5199534; 413095, 5199617; 413220, 5199696; 413634, 5199705; 413834, 5199702; 413941, 5199606; 414011, 5199668; 414163, 5199815; 414189, 5199727; 414265, 5199581; 414434, 5199496; 414600, 5199488; 414816, 5199423; 414960, 5199536; 415149, 5199660; 415368, 5199839; 415604, 5199856; 415808, 5199733; 416012, 5199539; 416064, 5199233; 416059, 5198892; 416059, 5198535; 416020, 5198256; 415914, 5198083; 415679, 5198078; 415512, 5198134; 415356, 5198262; 415200, 5198457; 414976, 5198591; 414791, 5198696; 414626, 5198794; 414430, 5198897; 414260, 5199040; 414064, 5199151; 413809, 5199254; 413603, 5199268; 413412, 5199107; 413205, 5198905; 413067, 5198813; 412875, 5198772; 412670, 5198713; 412504, 5198634; 412411, 5198529; 412393, 5198396; 412460, 5198236; 412387, 5198123; 412260, 5197998; 412114, 5198138; 411995, 5198227; 411816, 5198366; returning to 411969, 5198743.

(ii) **Note:** Map of Unit WA 2 (Map M5) follows:

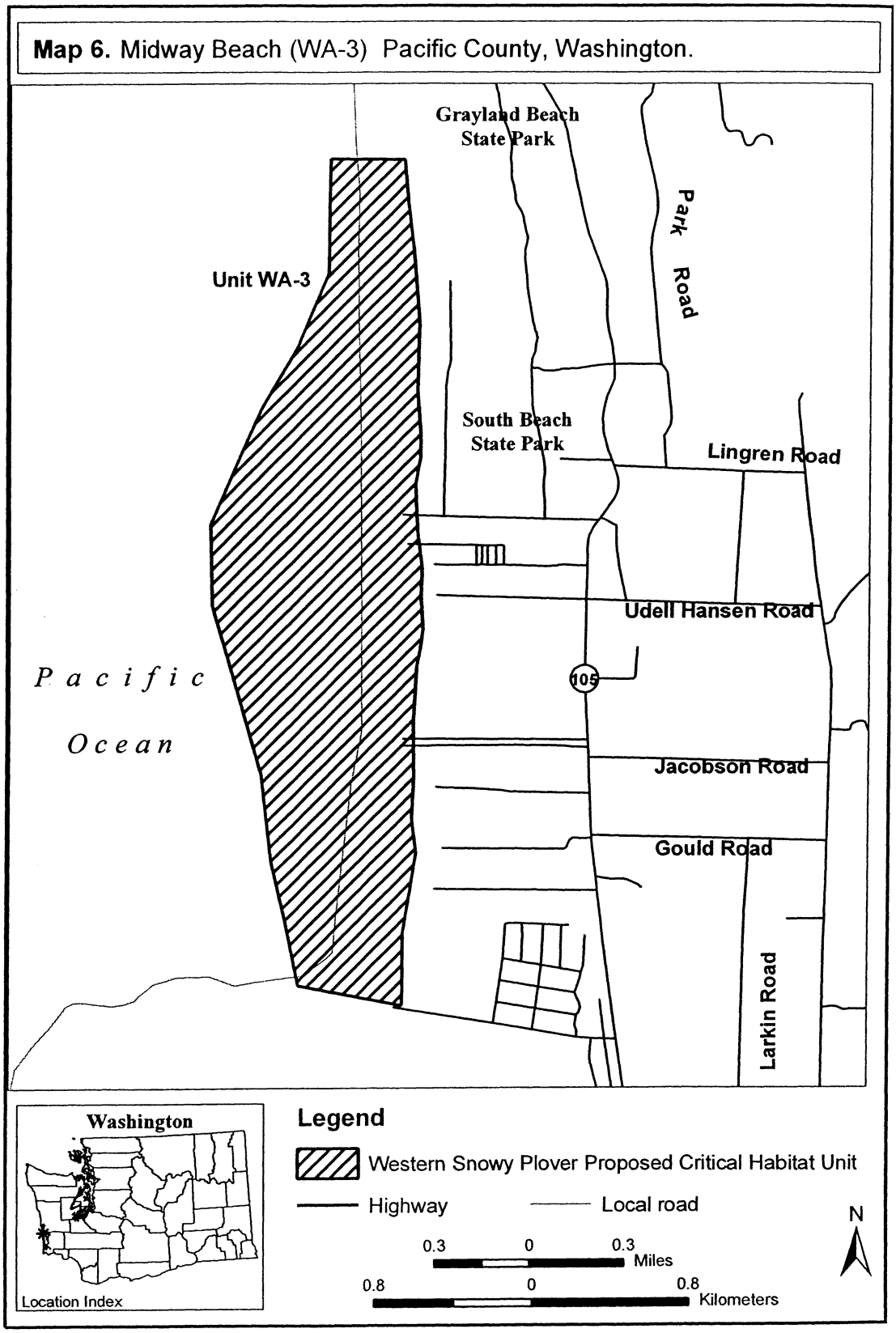
**Map 5.** Damon Point/Oyhut Wildlife Area(WA-2) Grays Harbor County, Washington.



(8) Unit WA 3, Pacific County, Washington.

(i) From USGS 1:24,000 quadrangle maps Grayland, and North Cove, Washington, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 416476, 5177381; 415946, 5177482; 415875, 5177830; 415806, 5178119; 415755, 5178555; 415630, 5178985; 415500, 5179419; 415492, 5179835; 415746, 5180411; 415933, 5180734; 416091, 5181113; 416093, 5181429; 416098, 5181688; 416474, 5181685; 416492, 5181483; 416521, 5181242; 416550, 5180859; 416543, 5180507; 416559, 5180293; 416559, 5180171; 416537, 5180035; 416541, 5179894; 416545, 5179798; 416570, 5179614; 416563, 5179469; 416574, 5179293; 416561, 5179199; 416543, 5179101; 416528, 5178820; 416534, 5178526; 416523, 5178330; 416545, 5178157; 416516, 5177956; 416481, 5177740; 416481, 5177511; returning to 416476, 5177381.

(ii) **Note:** Map of Unit WA 3 (Map M6) follows:

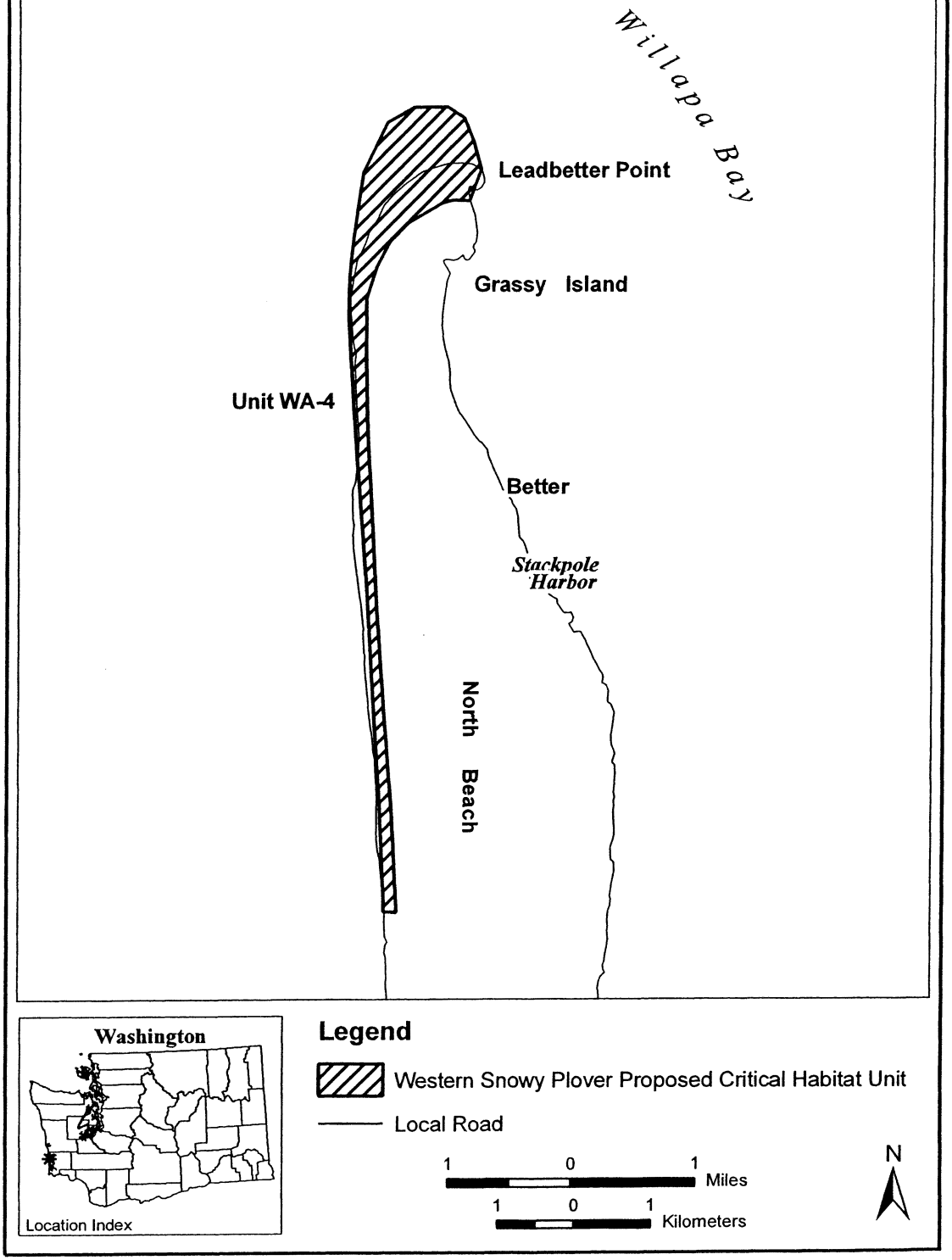

Map 6. Midway Beach (WA-3) Pacific County, Washington.
Grayland Beach State Park
Park Road
Unit WA-3
South Beach State Park
Lingren Road
Udell Hansen Road
105
Pacific Ocean
Jacobson Road
Gould Road
Larkin Road
Washington
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Highway
Local road
N
0.3 0 0.3 Miles
0.8 0 0.8 Kilometers

(9) Unit WA 4, Pacific County, Washington.

(i) From USGS 1:24,000 quadrangle maps North Cove, and Oysterville, Washington, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 418747, 5156518; 418673, 5156518; 418673, 5156666; 418617, 5157830; 418525, 5159271; 418433, 5160860; 418285, 5162689; 418193, 5164185; 418201, 5164730; 418262, 5165289; 418377, 5166088; 418684, 5166723; 419029, 5166925; 419464, 5166919; 419684, 5166777; 419815, 5166467; 419904, 5166114; 419756, 5165718; 419549, 5165726; 419403, 5165688; 419283, 5165618; 418960, 5165433; 418727, 5165193; 418549, 5164867; 418423, 5164456; 418422, 5163778; 418444, 5162761; 418503, 5161719; 418570, 5160431; 418666, 5159127; 418777, 5157778; 418843, 5156510; 418747, 5156518; returning to 418747, 5156518.

(ii) **Note:** Map of Unit WA 4 (Map M7) follows:

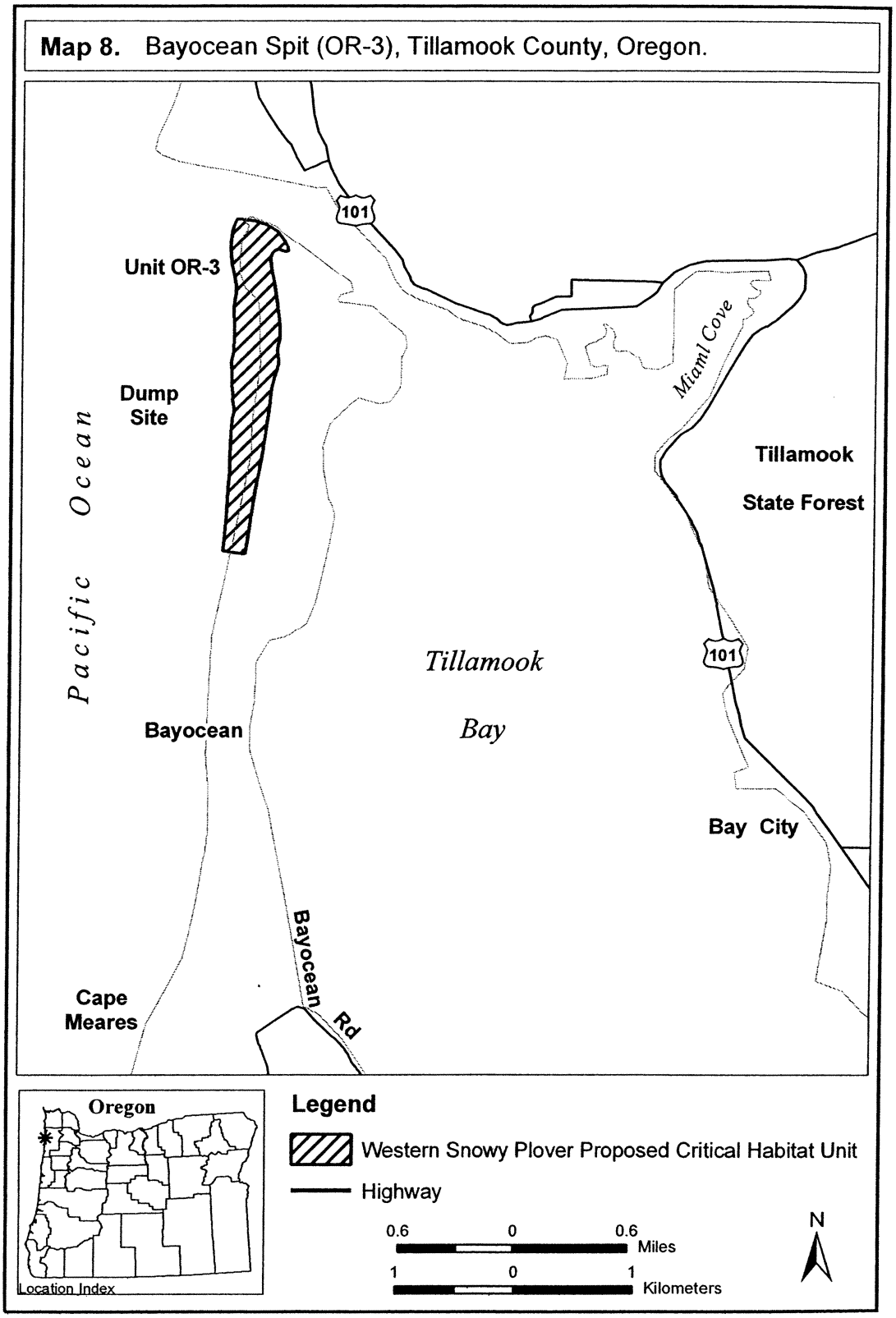
**Map 7.** Leadbetter Point/Gunpowder Sands (WA-4) Pacific County, Washington.



(10) Unit OR 3, Tillamook County, Oregon.

(i) From USGS 1:24,000 quadrangle map Garibaldi, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 425807, 5046046; 425855, 5046042; 425953, 5046029; 426052, 5045994; 426095, 5045969; 426142, 5045939; 426175, 5045895; 426208, 5045840; 426224, 5045807; 426227, 5045780; 426208, 5045772; 426184, 5045778; 426149, 5045794; 426122, 5045784; 426098, 5045756; 426081, 5045721; 426091, 5045643; 426120, 5045495; 426128, 5045441; 426159, 5045231; 426167, 5045131; 426167, 5045049; 426151, 5045006; 426143, 5044953; 426151, 5044898; 426159, 5044844; 426124, 5044732; 426104, 5044648; 426078, 5044433; 426052, 5044257; 426020, 5044062; 425972, 5043800; 425889, 5043253; 425718, 5043279; 425706, 5043277, proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 425807, 5046046.

(ii) **Note:** Map of Unit OR 3 (Map M8) follows:

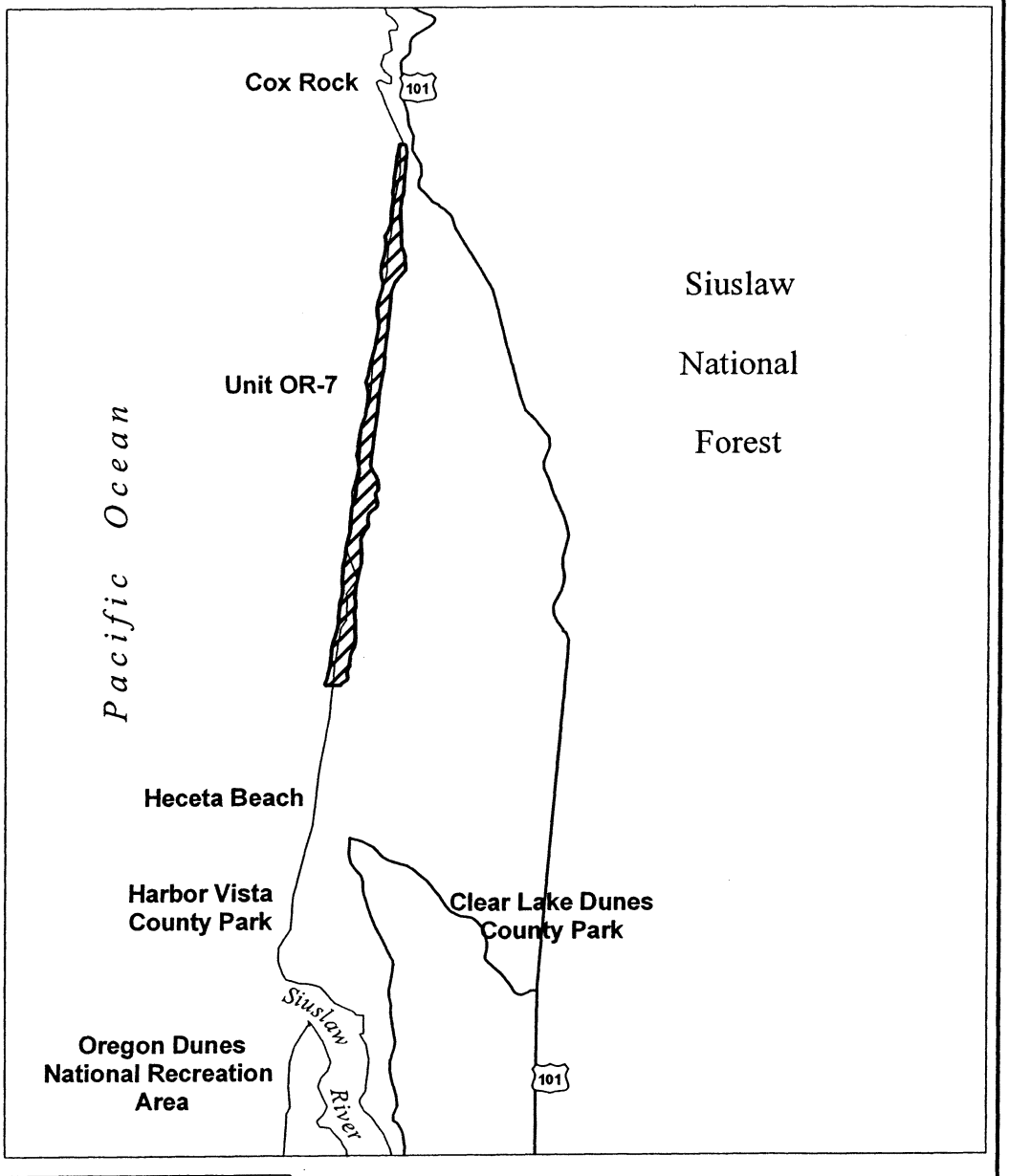

Map 8. Bayocean Spit (OR-3), Tillamook County, Oregon.
101
Unit OR-3
Dump Site
Pacific Ocean
Miami Cove
Tillamook State Forest
Tillamook Bay
101
Bayocean
Bay City
Bayocean Rd
Cape Meares
Oregon
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Highway
0.6 0 0.6 Miles
1 0 1 Kilometers
N

(11) Unit OR 7, Lane County, Oregon.

(i) From USGS 1:24,000 quadrangle maps Mercer Lake OE W, and Mercer Lake, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 410183, 4883959; 410218, 4883951; 410246, 4883955; 410260, 4883947; 410265, 4883920; 410273, 4883864; 410269, 4883809; 410257, 4883747; 410252, 4883652; 410244, 4883585; 410241, 4883515; 410230, 4883391; 410213, 4883323; 410205, 4883270; 410202, 4883221; 410198, 4883167; 410200, 4883104; 410207, 4883029; 410211, 4882970; 410206, 4882928; 410206, 4882870; 410213, 4882806; 410239, 4882738; 410252, 4882699; 410254, 4882655; 410259, 4882615; 410261, 4882590; 410259, 4882532; 410230, 4882501; 410203, 4882470; 410179, 4882445; 410156, 4882418; 410135, 4882388; 410116, 4882344; 410099, 4882271; 410059, 4881847; 410020, 4881553; 410011, 4881367; 409963, 4881129; 409938, 4880858; 409903, 4880597; 409872, 4880368; 409867, 4880331; 409863, 4880299; 409874, 4880271; 409885, 4880244; 409903, 4880212; 409921, 4880180; 409943, 4880130; 409952, 4880094; 409956, 4880050; 409954, 4880012; 409933, 4879992; 409921, 4879973; 409921, 4879955; 409929, 4879927; 409941, 4879890; 409944, 4879863; 409941, 4879833; 409935, 4879815; 409920, 4879804; 409874, 4879770; 409848, 4879743; 409839, 4879717; 409832, 4879667; 409841, 4879634; 409837, 4879601; 409822, 4879571; 409801, 4879536; 409784, 4879508; 409775, 4879488; 409764, 4879474; 409753, 4879444; 409768, 4879273; 409762, 4879169; 409726, 4879017; 409708, 4878913; 409692, 4878839; 409682, 4878765; 409698, 4878740; 409696, 4878733; 409699, 4878717; 409701, 4878694; 409696, 4878656; 409687, 4878598; 409692, 4878500; 409693, 4878433; 409699, 4878296; 409699, 4878270; 409695, 4878244; 409682, 4878211; 409665, 4878174; 409645, 4878126; 409639, 4878088; 409638, 4878061; 409631, 4878025; 409629, 4877989; 409615, 4877967; 409609, 4877942; 409604, 4877919; 409604, 4877895; 409613, 4877852; 409597, 4877832; 409549, 4877801; 409529, 4877773; 409450, 4877776; 409382, 4877775; 409347, 4877775; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 410183, 4883959.

(ii) **Note:** Map of Unit OR 7 (Map M9) follows:

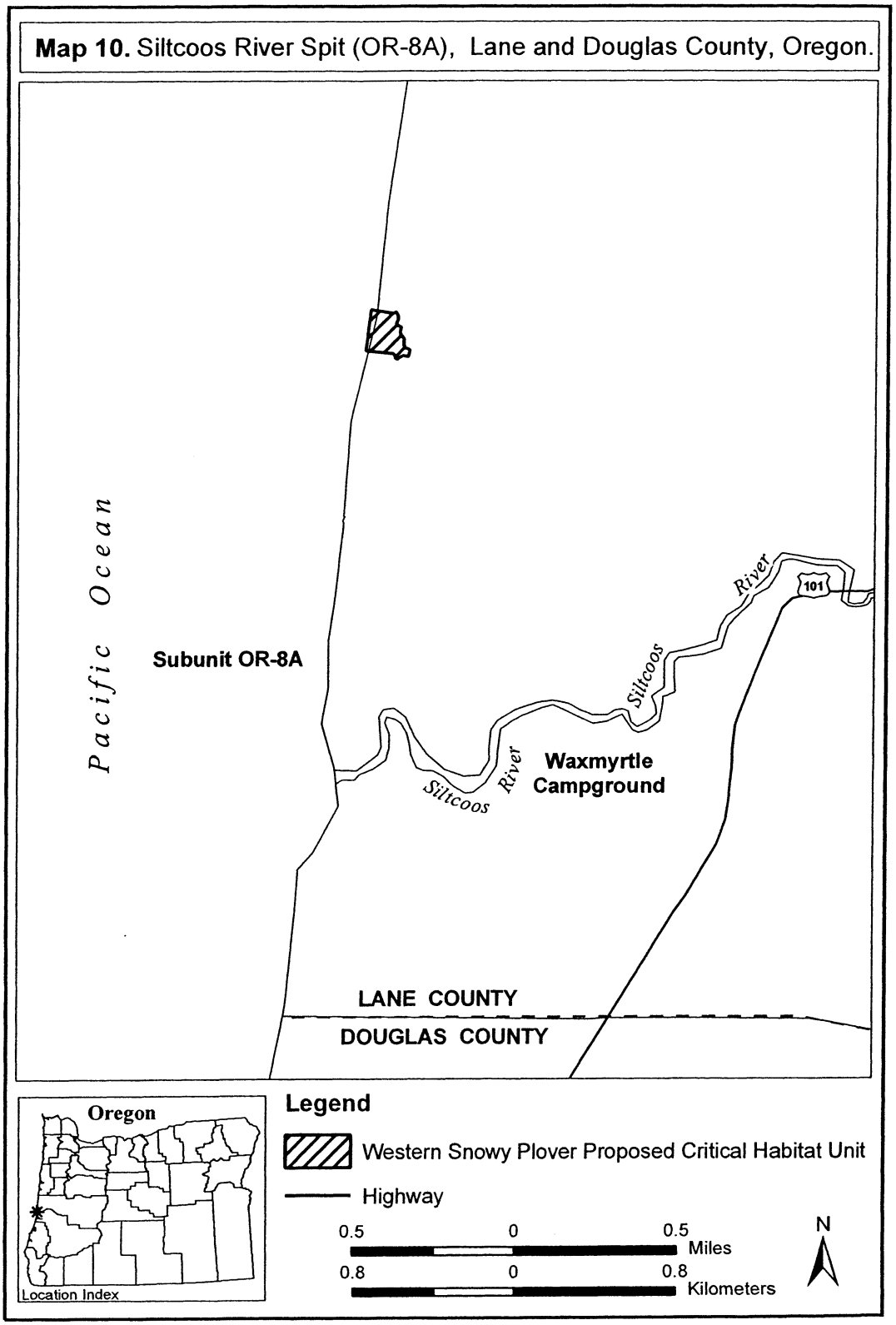
**Map 9.** Sutton/Baker Beaches (OR-7), Lane County, Oregon.



(12) Unit OR 8A, Lane County and Douglas County, Oregon.

(i) From USGS 1:24,000 quadrangle maps Goose Pasture, and Tahkenitch Creek, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 407380, 4860464; 407406, 4860666; 407511, 4860648; 407519, 4860648; 407522, 4860651; 407524, 4860654; 407527, 4860653; 407531, 4860649; 407535, 4860642; 407538, 4860635; 407538, 4860627; 407538, 4860619; 407537, 4860612; 407533, 4860609; 407530, 4860598; 407534, 4860589; 407553, 4860580; 407551, 4860572; 407549, 4860556; 407552, 4860545; 407556, 4860538; 407563, 4860528; 407570, 4860521; 407567, 4860514; 407566, 4860503; 407567, 4860492; 407577, 4860476; 407587, 4860473; 407596, 4860469; 407590, 4860435; 407561, 4860441; 407551, 4860436; 407542, 4860427; 407534, 4860424; 407526, 4860424; 407515, 4860451; 407380, 4860464; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 407380, 4860464.

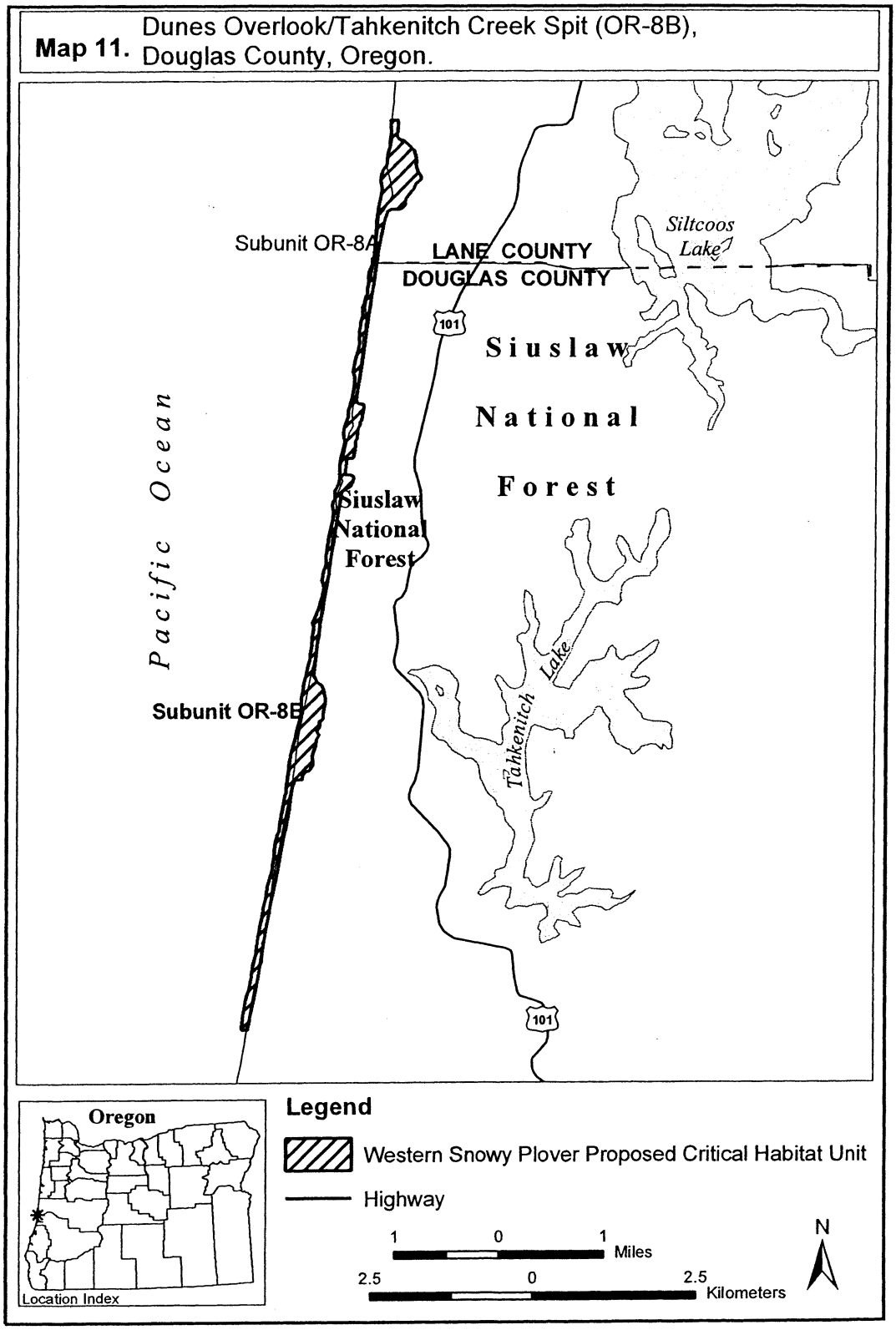
(ii) **Note:** Map of Unit OR 8A (Map M10) follows:


Map 10. Siltcoos River Spit (OR-8A), Lane and Douglas County, Oregon.
Pacific Ocean
Subunit OR-8A
Siltcoos River
Siltcoos River
101
Waxmyrtle Campground
LANE COUNTY
DOUGLAS COUNTY
Oregon
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Highway
0.5 0 0.5 Miles
0.8 0 0.8 Kilometers
N

(13) Unit OR 8B, Douglas County, Oregon.

(i) From USGS 1:24,000 quadrangle map Tahkenitch Creek, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 406189, 4851652; 406140, 4851272; 406110, 4850981; 406094, 4850863; 406112, 4850811; 406137, 4850770; 406164, 4850739; 406206, 4850717; 406241, 4850649; 406269, 4850528; 406271, 4850440; 406255, 4850358; 406244, 4850278; 406233, 4850190; 406208, 4850160; 406181, 4850149; 406192, 4850119; 406178, 4850053; 406151, 4849995; 406162, 4849965; 406181, 4849943; 406149, 4849887; 406142, 4849860; 406131, 4849819; 406125, 4849763; 406107, 4849710; 406076, 4849613; 406089, 4849502; 406063, 4849426; 406033, 4849394; 405990, 4849385; 405951, 4849350; 405932, 4849324; 405929, 4849295; 405921, 4849256; 405881, 4849256; 405830, 4849253; 405798, 4849226; 405769, 4849126; 405706, 4848682; 405673, 4848515; 405610, 4848210; 405577, 4847990; 405544, 4847815; 405461, 4847397; 405368, 4846903; 405280, 4846370; 405239, 4846137; 405096, 4845426; 405005, 4845434; 405022, 4845624; 405050, 4845765; 405069, 4845876; 405124, 4846045; 405154, 4846214; 405173, 4846400; 405225, 4846598; 405259, 4846861; 405308, 4847125; 405338, 4847285; 405365, 4847406; 405393, 4847605; 405432, 4847726; 405464, 4847878; 405505, 4848114; 405505, 4848215; 405526, 4848317; 405549, 4848411; 405568, 4848463; 405582, 4848526; 405588, 4848603; 405593, 4848630; 405626, 4848827; 405654, 4848993; 405681, 4849080; 405685, 4849161; 405712, 4849378; 405719, 4849497; 405744, 4849633; 405777, 4849767; 405819, 4849901; 405844, 4850059; 405879, 4850171; 405909, 4850333; 405898, 4850496; 405931, 4850644; 405953, 4850761; 406002, 4850989; 406034, 4851109; 406048, 4851202; 406062, 4851291; 406067, 4851372; 406069, 4851454; 406090, 4851580; 406079, 4851662; 406161, 4851892; 406192, 4852001; 406218, 4852092; 406239, 4852197; 406225, 4852259; 406209, 4852315; 406218, 4852367; 406230, 4852424; 406239, 4852484; 406266, 4852553; 406271, 4852635; 406273, 4852725; 406282, 4852799; 406294, 4852884; 406308, 4852962; 406321, 4853033; 406333, 4853104; 406348, 4853157; 406367, 4853248; 406379, 4853320; 406380, 4853362; 406377, 4853408; 406372, 4853454; 406369, 4853491; 406377, 4853533; 406406, 4853573; 406409, 4853618; 406406, 4853660; 406411, 4853702; 406426, 4853731; 406454, 4853795; 406476, 4853895; 406473, 4853951; 406476, 4854051; 406475, 4854119; 406494, 4854200; 406514, 4854270; 406530, 4854360; 406546, 4854443; 406532, 4854535; 406522, 4854585; 406551, 4854677; 406585, 4854767; 406603, 4854831; 406603, 4854865; 406608, 4854919; 406625, 4854991; 406645, 4855053; 406661, 4855121; 406679, 4855220; 406691, 4855306; 406702, 4855384; 406691, 4855441; 406671, 4855503; 406678, 4855555; 406691, 4855624; 406711, 4855718; 406739, 4855809; 406762, 4855906; 406774, 4855986; 406773, 4856058; 406762, 4856124; 406776, 4856189; 406787, 4856270; 406806, 4856354; 406815, 4856413; 406813, 4856487; 406833, 4856551; 406852, 4856628; 406860, 4856657; 406870, 4856676; 406877, 4856700; 406886, 4856729; 406887, 4856758; 406890, 4856789; 406904, 4856844; 406903, 4856902; 406899, 4856939; 406901, 4856996; 406910, 4857037; 406928, 4857075; 406954, 4857137; 406961, 4857195; 406963, 4857248; 406982, 4857293; 406989, 4857352; 406999, 4857467; 407004, 4857524; 407011, 4857598; 407012, 4857682; 407022, 4857762; 407023, 4857822; 407020, 4857860; 407039, 4857973; 407104, 4858294; 407093, 4858371; 407076, 4858441; 407082, 4858507; 407106, 4858572; 407131, 4858625; 407164, 4858662; 407179, 4858710; 407183, 4858790; 407200, 4858879; 407221, 4858961; 407247, 4859089; 407246, 4859131; 407241, 4859169; 407227, 4859248; 407237, 4859307; 407234, 4859358; 407347, 4859349; 407345, 4859280; 407338, 4859242; 407338, 4859206; 407336, 4859179; 407334, 4859157; 407329, 4859144; 407328, 4859128; 407331, 4859105; 407339, 4859089; 407347, 4859076; 407359, 4859065; 407371, 4859057; 407390, 4859051; 407418, 4859039; 407436, 4859030; 407457, 4859016; 407479, 4858997; 407513, 4858967; 407532, 4858949; 407554, 4858932; 407579, 4858907; 407587, 4858884; 407599, 4858847; 407612, 4858818; 407618, 4858790; 407626, 4858760; 407629, 4858742; 407628, 4858717; 407621, 4858691; 407615, 4858674; 407621, 4858634; 407632, 4858609; 407642, 4858582; 407654, 4858557; 407671, 4858533; 407691, 4858503; 407697, 4858486; 407699, 4858468; 407702, 4858459; 407680, 4858431; 407643, 4858402; 407633, 4858399; 407607, 4858357; 407565, 4858284; 407532, 4858252; 407492, 4858191; 407465, 4858156; 407454, 4858128; 407455, 4858063; 407402, 4858011; 407335, 4857992; 407298, 4857997; 407266, 4857992; 407232, 4857990; 407203, 4857980; 407181, 4857952; 407161, 4857909; 407146, 4857855; 407132, 4857793; 407127, 4857763; 407115, 4857726; 407092, 4857601; 407078, 4857519; 407056, 4857385; 407021, 4857166; 407011, 4857100; 406997, 4856986; 406943, 4856627; 406890, 4856228; 406828, 4855764; 406774, 4855388; 406720, 4855094; 406721, 4855074; 406731, 4855047; 406756, 4855023; 406791, 4855014; 406827, 4855005; 406838, 4854997; 406815, 4854865; 406816, 4854840; 406812, 4854805; 406803, 4854770; 406787, 4854746; 406784, 4854725; 406773, 4854681; 406749, 4854626; 406750, 4854589; 406731, 4854491; 406714, 4854455; 406710, 4854438; 406714, 4854398; 406700, 4854302; 406684, 4854217; 406675, 4854197; 406621, 4854191; 406594, 4854177; 406581, 4854167; 406555, 4853958; 406555, 4853937; 406601, 4853933; 406635, 4853937; 406665, 4853927; 406682, 4853911; 406679, 4853866; 406665, 4853816; 406650, 4853787; 406617, 4853748; 406582, 4853724; 406540, 4853706; 406525, 4853688; 406511, 4853681; 406504, 4853649; 406324, 4852508; 406312, 4852398; 406288, 4852280; 406189, 4851652; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 406189, 4851652.

(ii) **Note:** Map of Unit OR 8B (Map M11) follows:

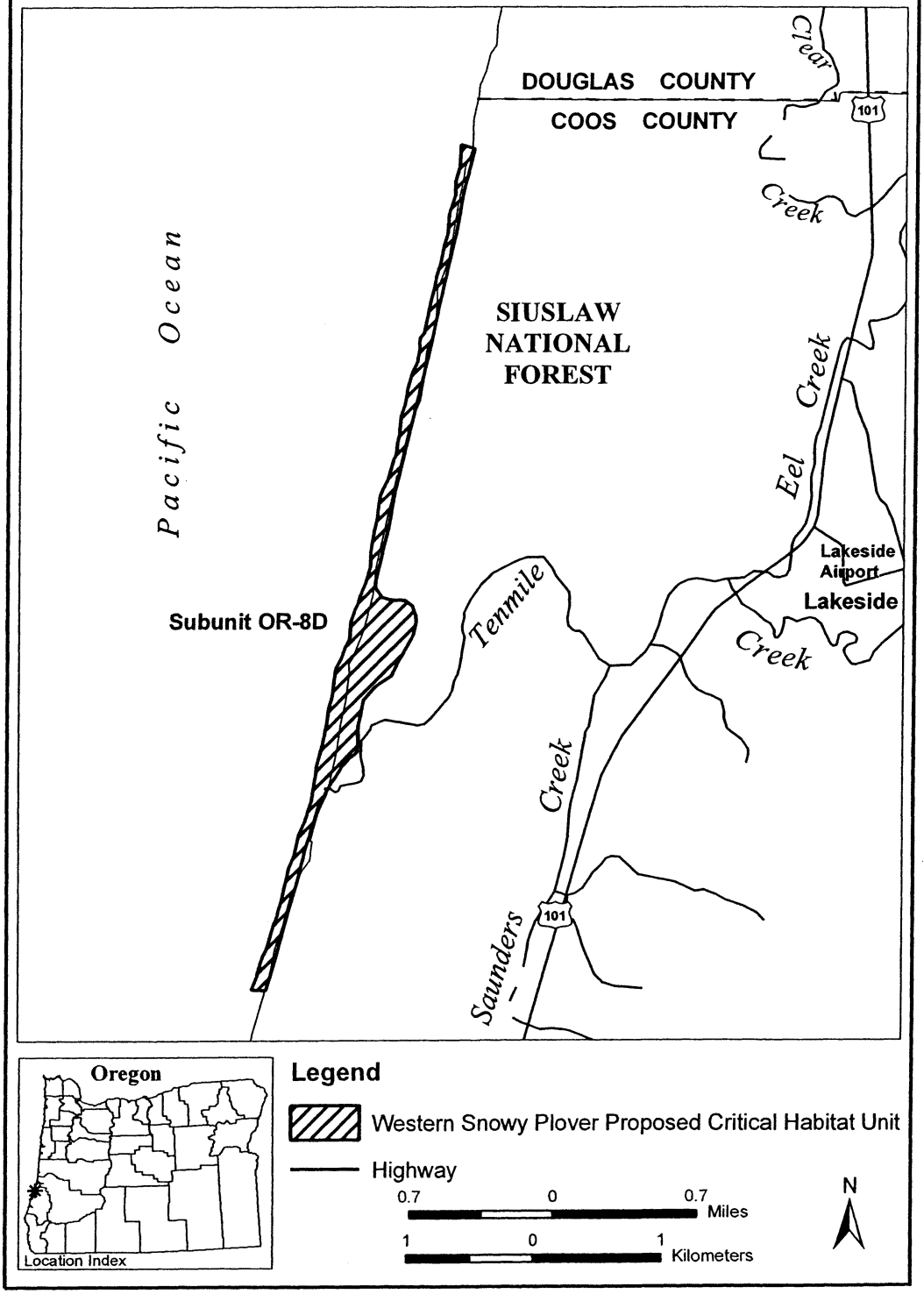

Map 11. Dunes Overlook/Tahkenitch Creek Spit (OR-8B), Douglas County, Oregon.
Subunit OR-8A
LANE COUNTY
DOUGLAS COUNTY
Siltcoos Lake
101
Siuslaw National Forest
Pacific Ocean
Siuslaw National Forest
Tahkenitch Lake
Subunit OR-8B
101
Oregon
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Highway
1 0 1 Miles
2.5 0 2.5 Kilometers
N

(14) Unit OR 8D, Coos County, Oregon.

(i) From USGS 1:24,000 quadrangle map Lakeside, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 401636, 4828760; 401679, 4828749; 401747, 4828726; 401658, 4828374; 401613, 4828096; 401470, 4827477; 401409, 4827191; 401129, 4826018; 401127, 4826013; 401086, 4825757; 401054, 4825630; 401025, 4825485; 400988, 4825352; 400986, 4825307; 401004, 4825278; 401041, 4825223; 401105, 4825207; 401218, 4825201; 401279, 4825159; 401303, 4825088; 401306, 4825027; 401290, 4824934; 401229, 4824826; 401173, 4824723; 401118, 4824609; 400993, 4824523; 400901, 4824418; 400880, 4824308; 400860, 4824209; 400860, 4824112; 400857, 4824072; 400855, 4824044; 400852, 4824012; 400827, 4823985; 400798, 4823971; 400769, 4823937; 400747, 4823910; 400729, 4823894; 400718, 4823871; 400697, 4823844; 400679, 4823812; 400650, 4823775; 400612, 4823704; 400552, 4823593; 400483, 4823365; 400446, 4823262; 400393, 4823043; 400362, 4822926; 400335, 4822833; 400320, 4822785; 400224, 4822422; 400189, 4822303; 400141, 4822147; 400030, 4822156; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 401636, 4828760.

(ii) **Note:** Map of Unit OR 8D (Map M12) follows:

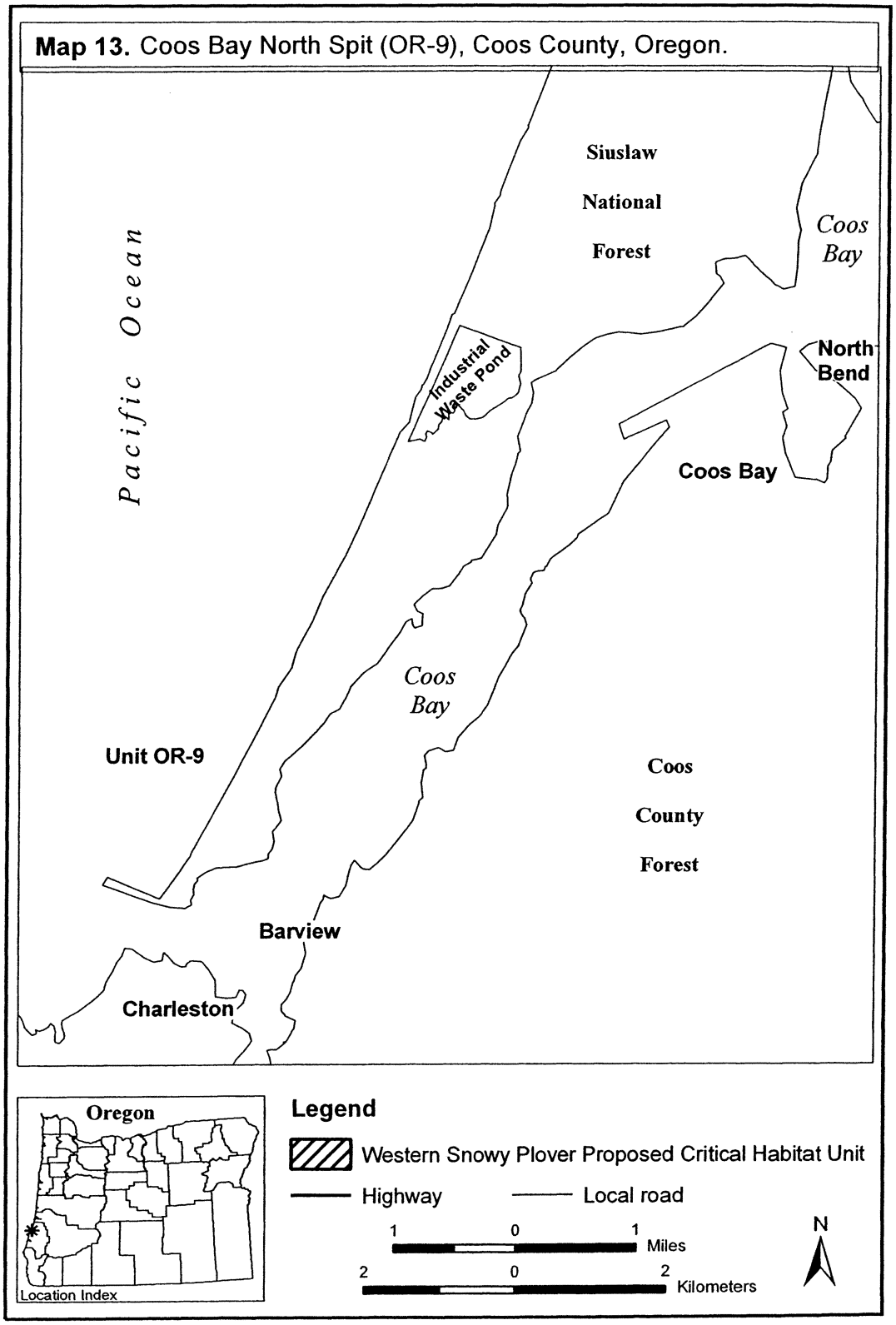
**Map 12.** Tenmile Creek Spit (OR-8D), Coos County, Oregon.



(15) Unit OR 9, Coos County, Oregon.

(i) From USGS 1:24,000 quadrangle maps Empire, and Charleston, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 401636, 4828760; 394245, 4805890; 393957, 4805261; 393701, 4804768; 393592, 4804572; 393390, 4804169; 393440, 4804146; 393286, 4803816; 393209, 4803614; 393042, 4803271; 392971, 4803090; 392984, 4802913; 392971, 4802808; 392997, 4802749; 393060, 4802650; 392984, 4802525; 392909, 4802426; 392851, 4802339; 392965, 4802319; 393103, 4802120; 393037, 4801882; 392991, 4801895; 392942, 4801829; 392915, 4801780; 392702, 4801829; 392390, 4801908; 392192, 4801921; 392137, 4801773; 392058, 4801603; 391696, 4801111; 391595, 480115 proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 401636, 4828760.

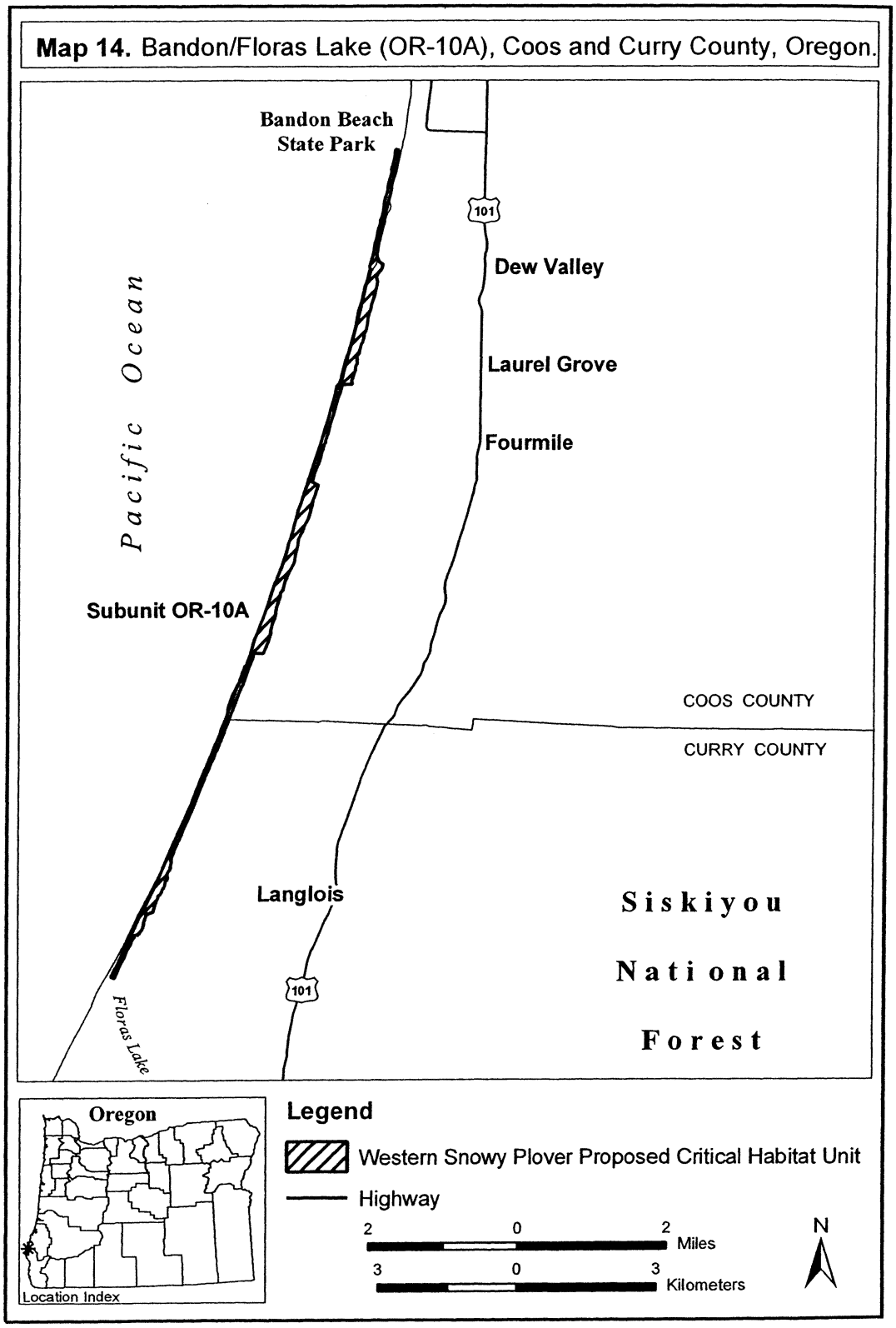
(ii) **Note:** Map of Unit OR 9 (Map M13) follows:


Map 13. Coos Bay North Spit (OR-9), Coos County, Oregon.
Siuslaw
National
Forest
Coos
Bay
Pacific Ocean
Industrial
Waste Pond
North
Bend
Coos Bay
Coos
Bay
Unit OR-9
Coos
County
Forest
Barview
Charleston
Oregon
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Highway
Local road
1 0 1
Miles
2 0 2
Kilometers
N

(16) Unit OR 10A, Coos County and Curry County, Oregon.

(i) From USGS 1:24,000 quadrangle maps Bandon, Floras Lake, and Langlois, Oregon, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 383032, 4769361; 383046, 4769436; 383042, 4769495; 383042, 4769541; 383036, 4769584; 383034, 4769625; 383032, 4769672; 383047, 4769672; 383079, 4769666; 383115, 4769654; 383145, 4769655; 383178, 4769655; 383202, 4769645; 383228, 4769633; 383248, 4769596; 383259, 4769526; 383250, 4769486; 383225, 4769479; 383179, 4769476; 383171, 4769447; 383135, 4769361; 383100, 4769213; 383079, 4769128; 383063, 4769061; 383047, 4768989; 383045, 4768946; 383030, 4768890; 383012, 4768820; 382991, 4768707; 382977, 4768620; 382965, 4768535; 382940, 4768432; 382917, 4768316; 382895, 4768227; 382870, 4768128; 382853, 4768018; 382833, 4767920; 382798, 4767778; 382768, 4767645; 382735, 4767504; 382713, 4767389; 382691, 4767273; 382666, 4767174; 382643, 4767072; 382628, 4766975; 382608, 4766922; 382591, 4766834; 382566, 4766684; 382544, 4766554; 382576, 4766510; 382603, 4766451; 382644, 4766419; 382674, 4766392; 382671, 4766339; 382641, 4766274; 382588, 4766209; 382541, 4766138; 382545, 4766086; 382567, 4766024; 382556, 4765947; 382545, 4765889; 382529, 4765815; 382508, 4765731; 382480, 4765623; 382443, 4765515; 382432, 4765445; 382402, 4765359; 382379, 4765289; 382368, 4765189; 382358, 4765107; 382333, 4765011; 382296, 4764904; 382289, 4764842; 382255, 4764757; 382230, 4764699; 382219, 4764637; 382198, 4764585; 382190, 4764527; 382180, 4764495; 382154, 4764458; 382142, 4764403; 382142, 4764352; 382142, 4764287; 382120, 4764238; 382110, 4764191; 382108, 4764152; 382081, 4764081; 382057, 4764030; 382051, 4764000; 382053, 4763958; 382032, 4763917; 382035, 4763877; 382038, 4763851; 381965, 4763851; 381908, 4763845; 381855, 4763831; 381835, 4763787; 381815, 4763732; 381796, 4763652; 381768, 4763565; 381740, 4763474; 381700, 4763351; 381665, 4763216; 381633, 4763117; 381613, 4763049; 381577, 4762926; 381547, 4762797; 381509, 4762682; 381487, 4762602; 381457, 4762530; 381435, 4762449; 381415, 4762385; 381387, 4762281; 381356, 4762183; 381331, 4762117; 381322, 4762102; 381279, 4761979; 381241, 4761866; 381217, 4761735; 381284, 4761715; 381342, 4761681; 381292, 4761524; 381229, 4761341; 381210, 4761227; 381165, 4761047; 381126, 4760920; 381057, 4760801; 381017, 4760674; 380975, 4760600; 380940, 4760529; 380922, 4760431; 380893, 4760280; 380861, 4760150; 380845, 4760050; 380821, 4759978; 380771, 4759894; 380735, 4759845; 380710, 4759775; 380685, 4759712; 380647, 4759617; 380621, 4759515; 380602, 4759445; 380558, 4759388; 380539, 4759293; 380507, 4759191; 380469, 4759070; 380450, 4758982; 380431, 4758842; 380405, 4758791; 380386, 4758721; 380361, 4758639; 380348, 4758556; 380340, 4758479; 380312, 4758387; 380278, 4758300; 380183, 4758086; 379983, 4758087; 379957, 4757987; 379865, 4757759; 379821, 4757615; 379737, 4757407; 379704, 4757340; 379624, 4757140; 379560, 4756968; 379496, 4756803; 379432, 4756628; 379387, 4756528; 379333, 4756378; 379270, 4756202; 379190, 4756013; 379160, 4755949; 379119, 4755837; 379072, 4755728; 379003, 4755562; 378939, 4755407; 378934, 4755397; 378894, 4755299; 378848, 4755186; 378802, 4755067; 378732, 4754907; 378684, 4754772; 378652, 4754685; 378588, 4754546; 378553, 4754457; 378497, 4754350; 378440, 4754210; 378435, 4754197; 378372, 4754061; 378343, 4753975; 378311, 4753896; 378286, 4753834; 378276, 4753808; 378264, 4753779; 378238, 4753706; 378235, 4753663; 378233, 4753630; 378226, 4753586; 378215, 4753550; 378208, 4753517; 378208, 4753479; 378193, 4753454; 378168, 4753407; 378140, 4753371; 378140, 4753331; 378149, 4753278; 378140, 4753234; 378110, 4753195; 378099, 4753128; 378063, 4753070; 378034, 4753026; 378017, 4752979; 377999, 4752941; 377988, 4752913; 377955, 4752901; 377934, 4752879; 377939, 4752854; 377935, 4752828; 377911, 4752803; 377895, 4752751; 377879, 4752704; 377867, 4752664; 377851, 4752619; 377850, 4752586; 377832, 4752547; 377811, 4752531; 377785, 4752535; 377769, 4752528; 377750, 4752506; 377728, 4752511; 377714, 4752531; 377697, 4752531; 377703, 4752515; 377700, 4752489; 377688, 4752482; 377692, 4752456; 377673, 4752408; 377646, 4752346; 377641, 4752310; 377639, 4752271; 377630, 4752232; 377594, 4752154; 377575, 4752116; 377560, 4752101; 377543, 4752081; 377528, 4752077; 377524, 4752063; 377532, 4752050; 377506, 4752057; 377484, 4752070; 377462, 4752061; 377445, 4752023; 377415, 4751972; 377378, 4751899; 377368, 4751881; 377287, 4751726; 377202, 4751552; 377118, 4751382; 377052, 4751245; 377001, 4751131; 376982, 4751082; 376962, 4751045; 376928, 4750980; 376866, 4750871; 376751, 4750655; 376686, 4750517; 376667, 4750450; 376658, 4750421; 376640, 4750398; 376621, 4750368; 376621, 4750340; 376624, 4750312; 376624, 4750295; 376616, 4750282; 376607, 4750262; 376599, 4750241; 376588, 4750216; 376577, 4750207; 376442, 4750212; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 383032, 4769361.

(ii) **Note:** Map of Unit OR 10A (Map M14) follows:

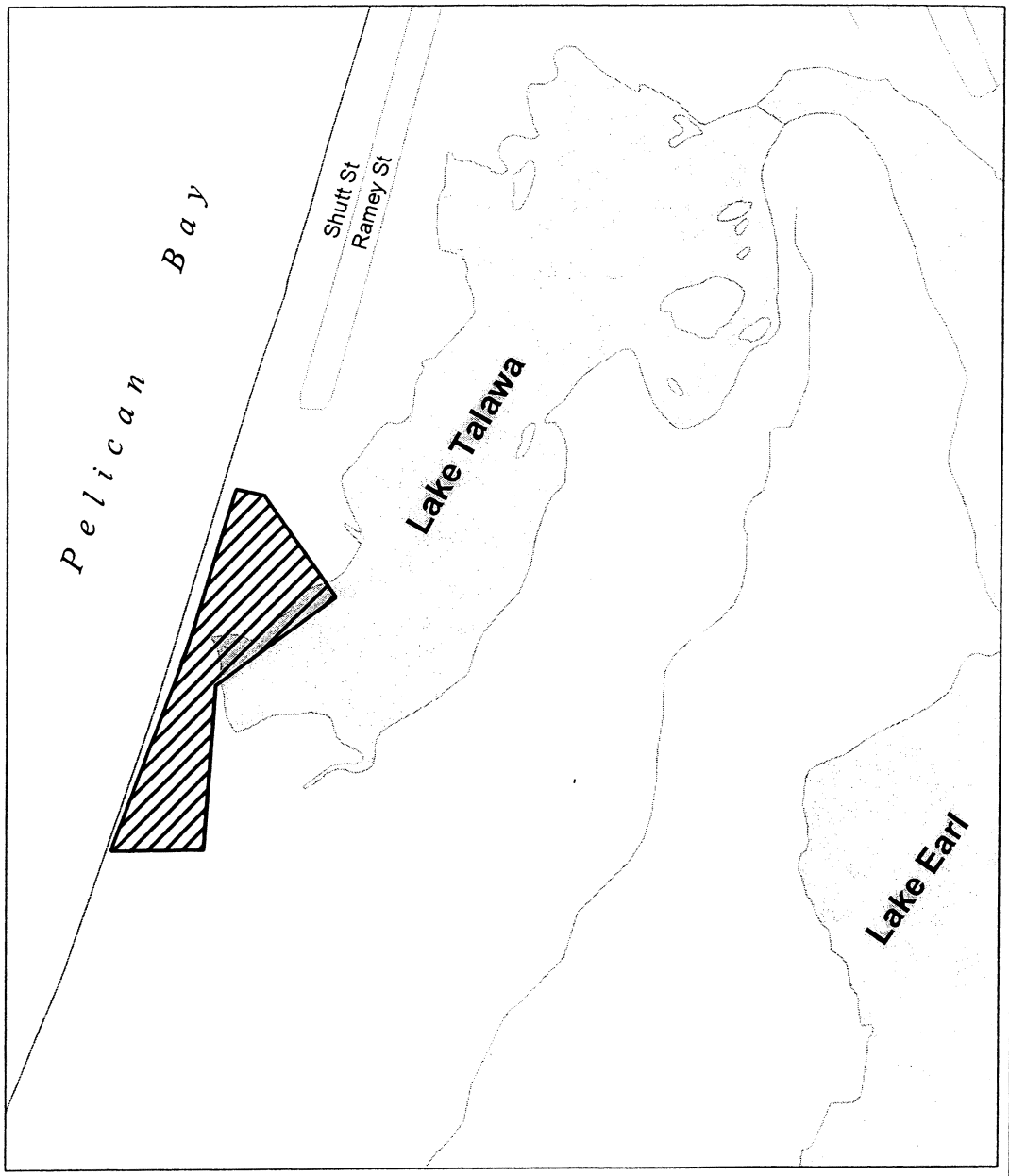

Map 14. Bandon/Floras Lake (OR-10A), Coos and Curry County, Oregon.
Bandon Beach State Park
101
Dew Valley
Laurel Grove
Fourmile
Pacific Ocean
Subunit OR-10A
COOS COUNTY
CURRY COUNTY
Langlois
Siskiyou National Forest
101
Floras Lake
Oregon
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Highway
2 0 2 Miles
3 0 3 Kilometers
N

(17) Unit CA 1, Del Norte County, California.

(i) From USGS 1:24,000 quadrangle map Crescent City, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 398209, 4631037; 398218, 4631060; 398224, 4631082; 398235, 4631106; 398262, 4631184; 398262, 4631184; 398262, 4631185; 398373, 4631543; 398383, 4631574; 398467, 4631555; 398466, 4631552; 398670, 4631260; 398324, 4631005; 398289, 4630526; 398017, 4630524; 398209, 4631037; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 398209, 4631037.

(ii) **Note:** Map of Unit CA 1 (Map M15) follows:

**Map 15.** Lake Earl (CA-1), Del Norte County, California.

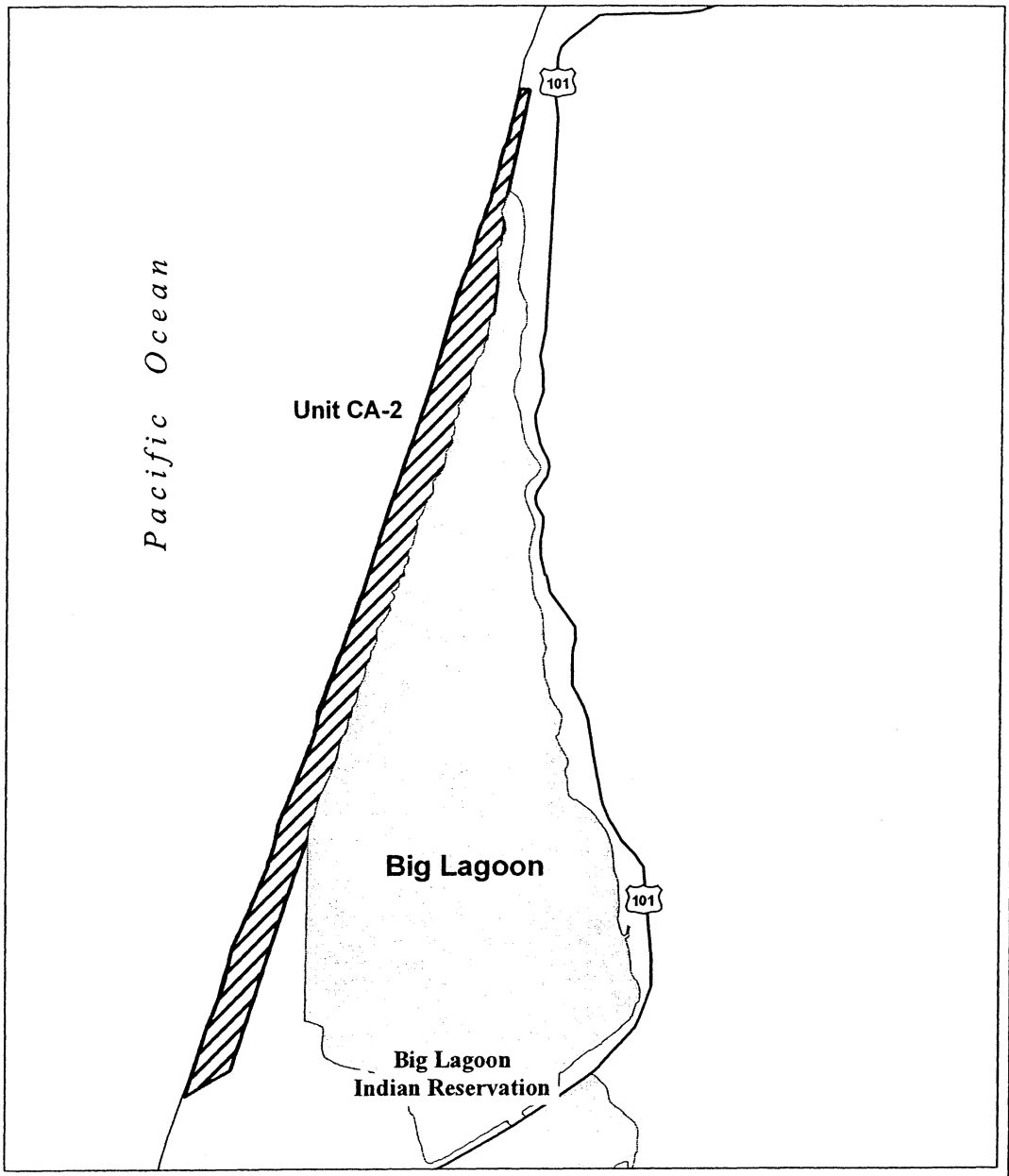


(18) Unit CA 2, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle maps Rodgers Peak, and Trinadad, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 406854, 4563175; 406909, 4563169; 406777, 4562537; 406691, 4561673; 406135, 4560211; 405555, 4558600; 405187, 4557482; 404923, 4557330; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 406854, 4563175.

(ii) **Note:** Map of Unit CA 2 (Map M16) follows:

**Map 16.** Big Lagoon (CA-2), Humboldt County, California.



(19) Unit CA 3A, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle maps Crannell, and Arcata North, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 406554, 4541473; 406850, 4541471; 406870, 4540965; 406746, 4540695; 406583, 4540426; 406413, 4539149; 406354, 4538891; 406371, 4538797; 406294, 4538652; 406149, 4538652; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 406554, 4541473.

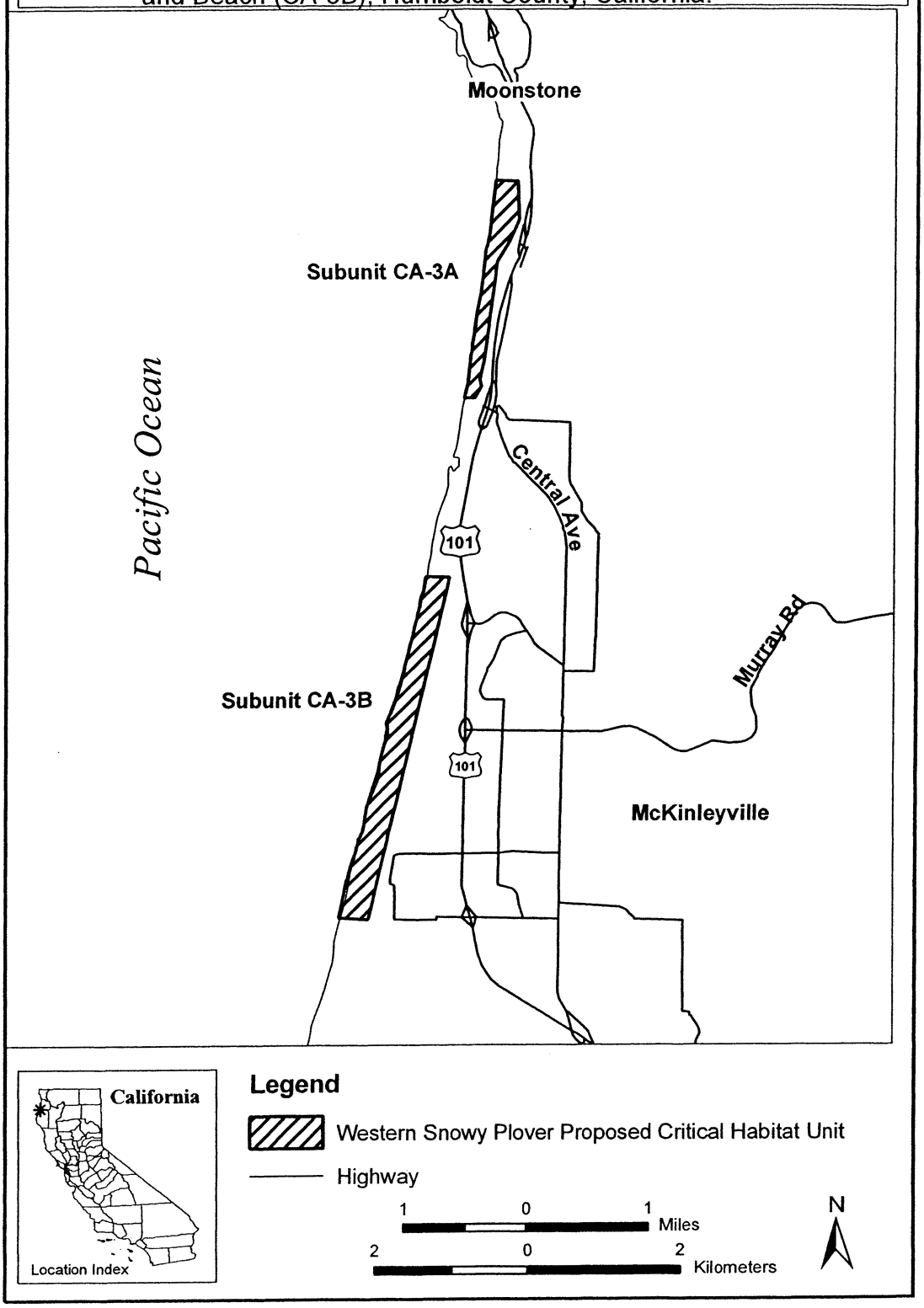
(ii) **Note:** Map of Unit CA 3A (Map M17) follows after description of Unit CA 3B.

(20) Unit CA 3B, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle maps Arcata North, and Tyee City, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 405657, 4536319; 405968, 4536317; 404931, 4531851; 404539, 4531879 proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 405657, 4536319.

(ii) **Note:** Map of Units CA 3A and CA 3B (Map M17) follows:

**Map 17.** Clam Beach/Little River (CA-3A) and Mad River Mouth and Beach (CA-3B), Humboldt County, California.

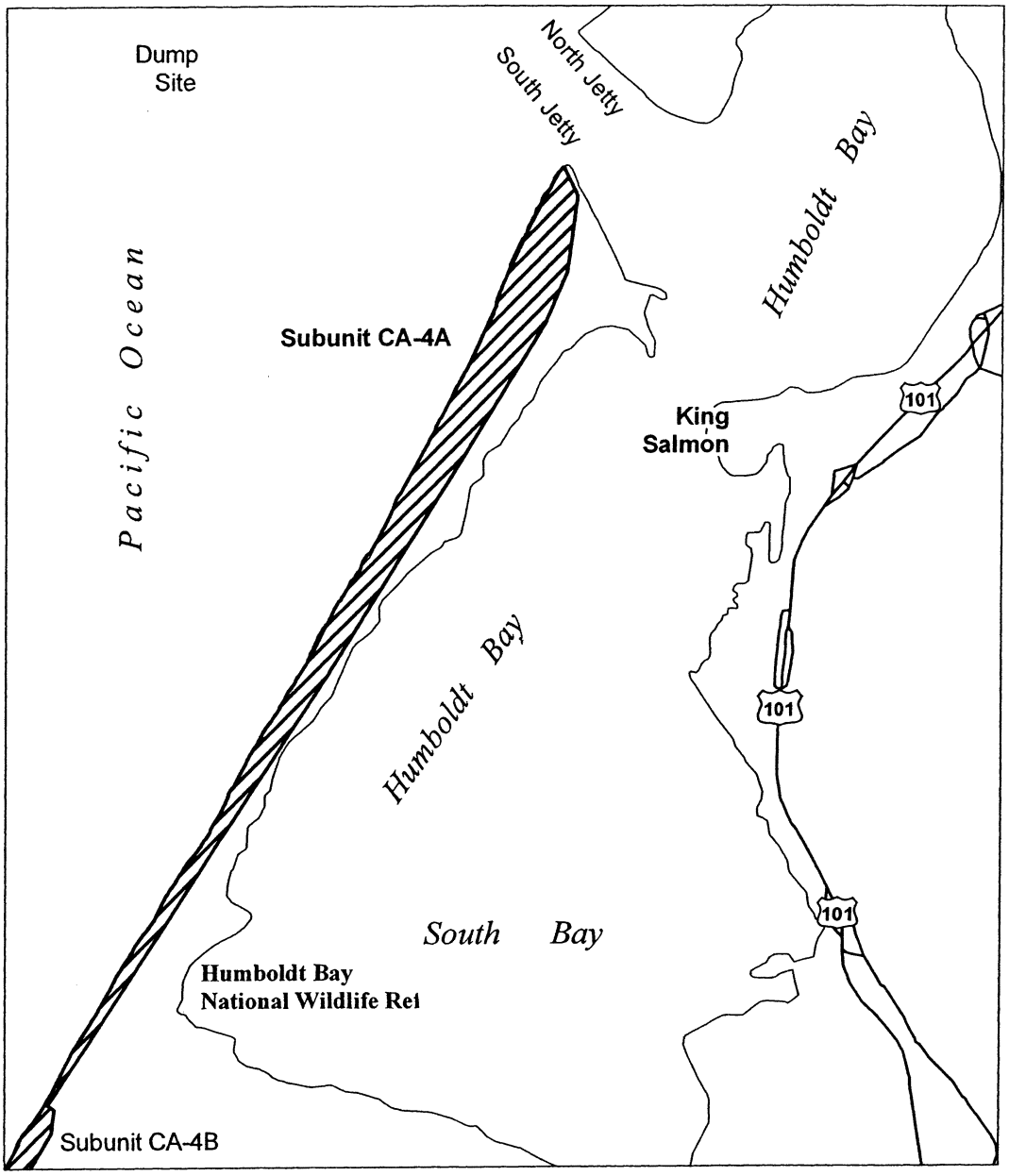


(21) Unit CA 4A, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle maps Eureka, Fields Landing, and Cannibal Island, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 395866, 4512270; 395968, 4512054; 395898, 4511510; 395741, 4511140; 394616, 4509320; 394166, 4508589; 392132, 4505460; 392114, 4505473 proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 395866, 4512270.

(ii) **Note:** Map of Unit CA 4A (Map M18) follows:

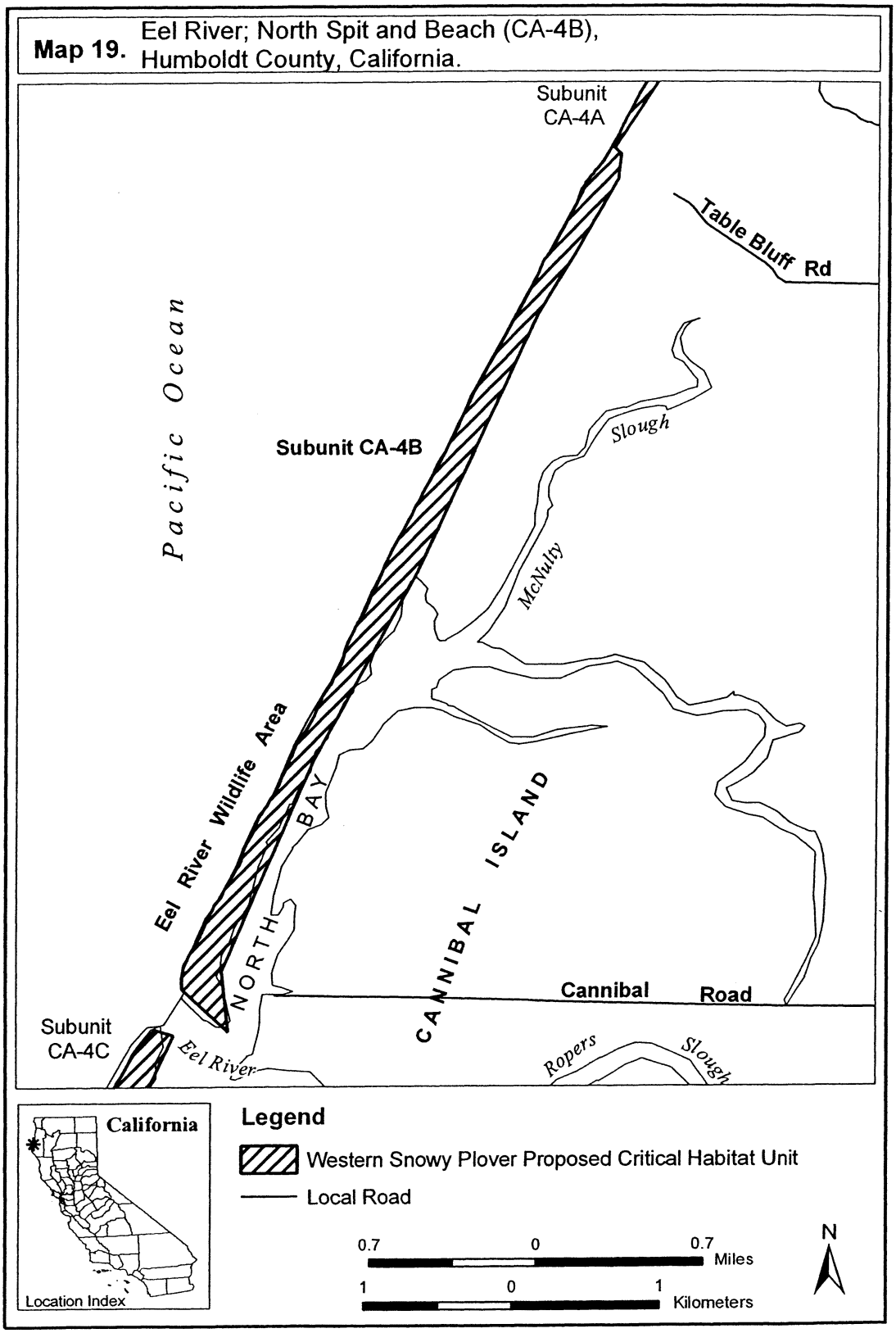
**Map 18.** Humboldt Bay; South Spit (CA-4A), Humboldt County, California.



(22) Unit CA 4B, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle map Cannibal Island, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 392114, 4505473; 392178, 4505423; 392157, 4505254; 391892, 4504800; 391616, 4504350; 390808, 4502622; 390100, 4501334; 389495, 4499927; 389538, 4499526; 389226, 4499809 proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 392114, 4505473.

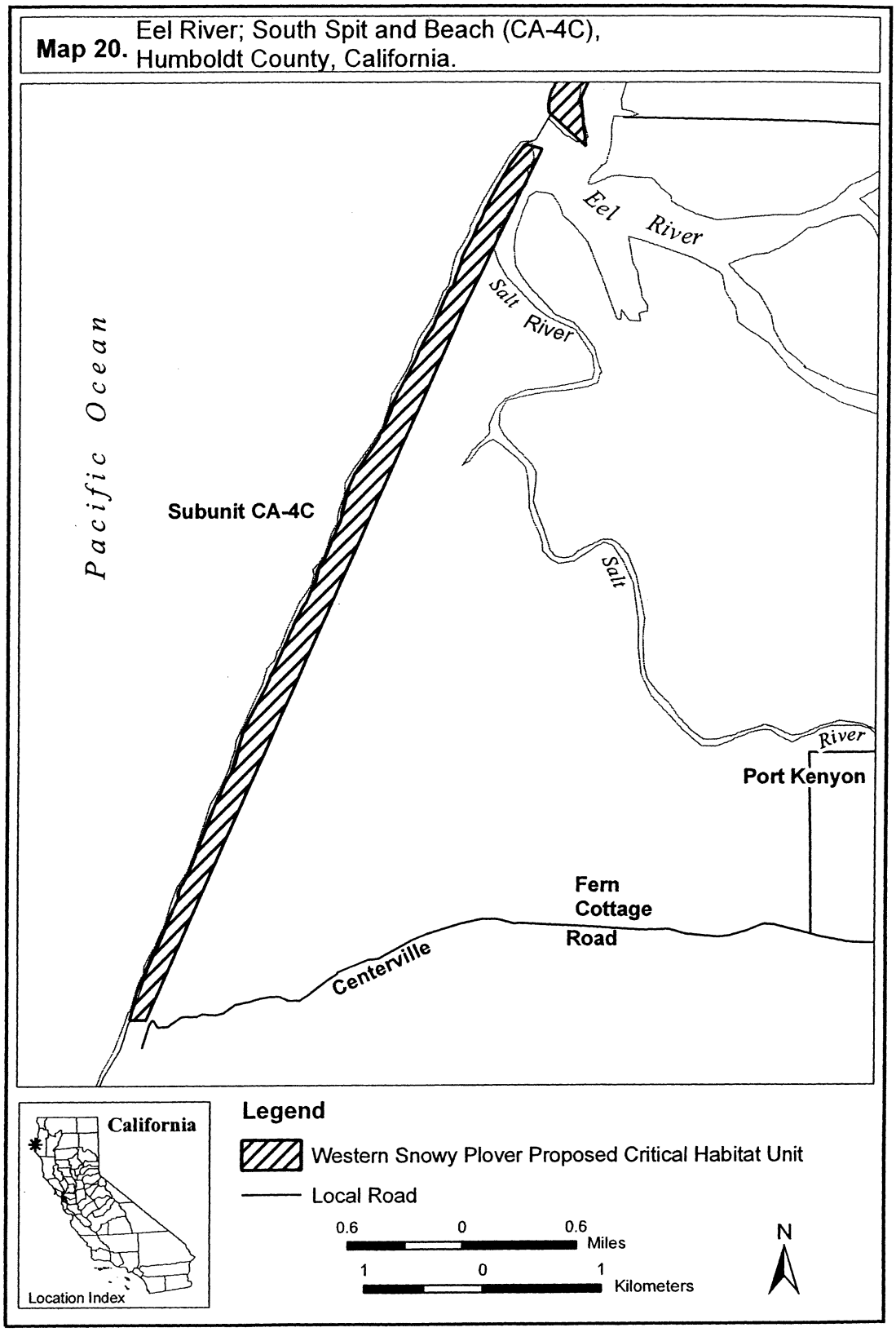
(ii) **Note:** Map of Unit CA 4B (Map M19) follows:


Map 19. Eel River; North Spit and Beach (CA-4B), Humboldt County, California.
Subunit CA-4A
Table Bluff Rd
Pacific Ocean
Subunit CA-4B
Slough
McNulty
Eel River Wildlife Area
BAY
NORTH
CANNIBAL ISLAND
Cannibal Road
Subunit CA-4C
Eel River
Ropers Slough
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
Local Road
0.7 0 0.7 Miles
1 0 1 Kilometers
N

(23) Unit CA 4C, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle maps Cannibal Island, and Ferndale, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 389046, 4499539; 389171, 4499501; 388506, 4498145; 385862, 4492184; 385723, 4492184 proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 389046, 4499539.

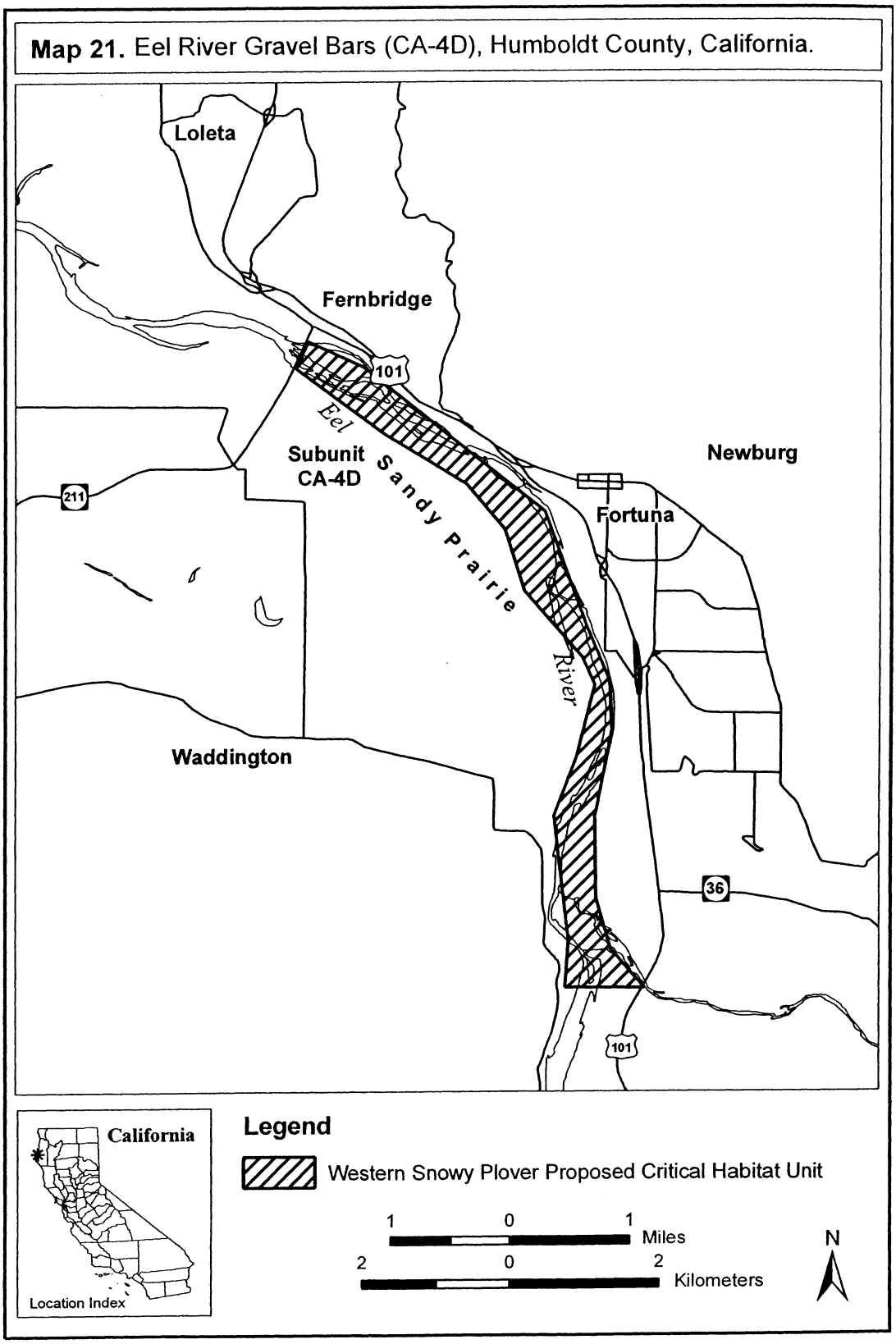
(ii) **Note:** Map of Unit CA 4C (Map M20) follows:



(24) Unit CA 4D, Humboldt County, California.

(i) From USGS 1:24,000 quadrangle map Fortuna, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 402468, 4488324; 402916, 4487812; 401861, 4487818; 401912, 4488452; 401713, 4490121; 402020, 4490920; 402257, 4491861; 402084, 4492244; 401310, 4493127; 401048, 4493965; 400511, 4494573; 399443, 4495225; 398221, 4496114; 398394, 4496472; 399149, 4496127; 400242, 4495244; 401586, 4494208; 402142, 4492667; 402449, 4491912; 402481, 4491253; 402263, 4490095; 402276, 4489021; 402468, 4488324; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 402468, 4488324.

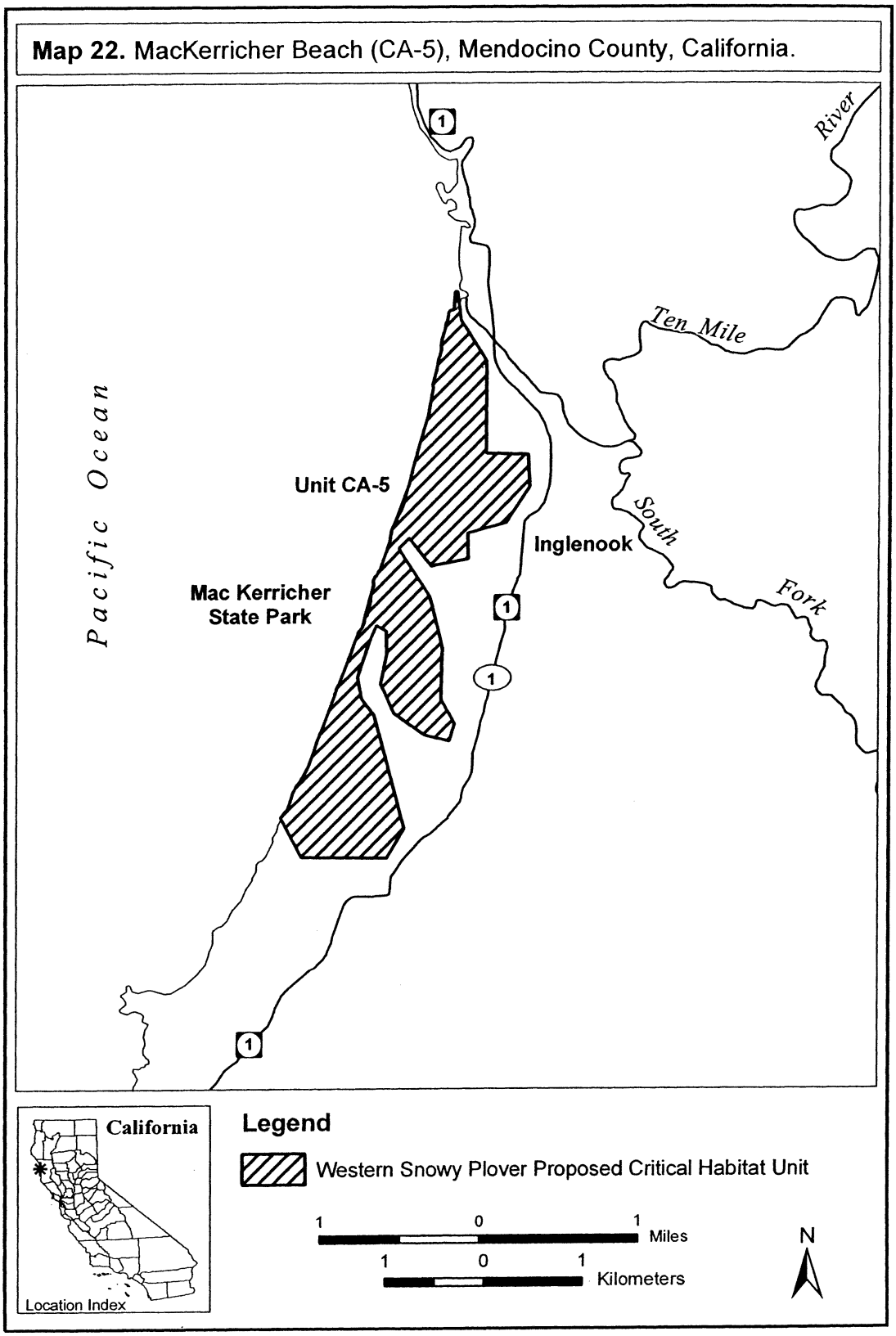
(ii) **Note:** Map of Unit CA 4D (Map M21) follows:


Map 21. Eel River Gravel Bars (CA-4D), Humboldt County, California.
Loleta
Fernbridge
101
Eel
Subunit
CA-4D
Sandy Prairie
River
Newburg
Fortuna
211
Waddington
36
101
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
1 0 1
Miles
2 0 2
Kilometers
N

(25) Unit CA 5, Mendocino County, California.

(i) From USGS 1:24,000 quadrangle map Inglenook, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 434183, 4378272; 434210, 4378274; 434246, 4377994; 434507, 4377586; 434498, 4376652; 434928, 4376643; 434941, 4376311; 434702, 4375952; 434316, 4375850; 434321, 4375592; 433949, 4375521; 433722, 4375797; 433623, 4375691; 433938, 4375209; 434062, 4374702; 434048, 4374174; 434190, 4373926; 434133, 4373749; 433892, 4373805; 433570, 4374036; 433436, 4374324; 433498, 4374626; 433493, 4374864; 433391, 4374920; 433325, 4374764; 433205, 4374397; 433246, 4374176; 433373, 4374009; 433684, 4372868; 433502, 4372573; 432647, 4372582; 432442, 4372975; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 434183, 4378272.

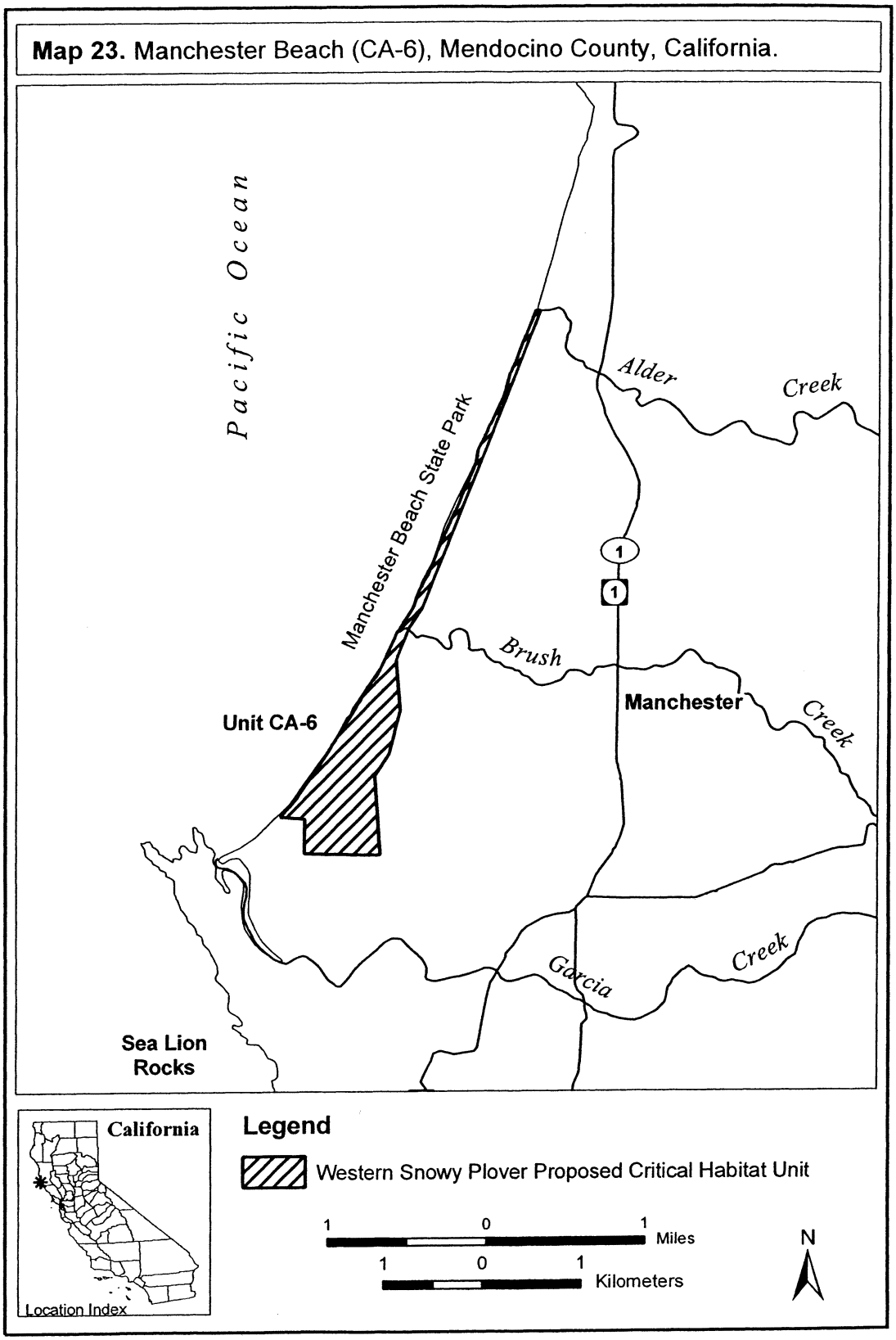
(ii) **Note:** Map of Unit CA 5 (Map M22) follows:


Map 22. MacKerricher Beach (CA-5), Mendocino County, California.
Pacific Ocean
Unit CA-5
Mac Kerricher State Park
Inglenook
South Fork
Ten Mile
River
1
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
1 0 1 Miles
1 0 1 Kilometers
N

(26) Unit CA 6, Mendocino County, California.

(i) From USGS 1:24,000 quadrangle maps Mallo Pass Creek, and Point Arena California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 439747, 4317317; 439796, 4317313; 439669, 4316995; 439235, 4315894; 438610, 4314327; 438483, 4314133; 438349, 4313805; 438391, 4313293; 438277, 4312863; 438136, 4312640; 438192, 4311851; 437426, 4311863; 437428, 4312213; 437179, 4312237; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 439747, 4317317.

(ii) **Note:** Map of Unit CA 6 (Map M23) follows:

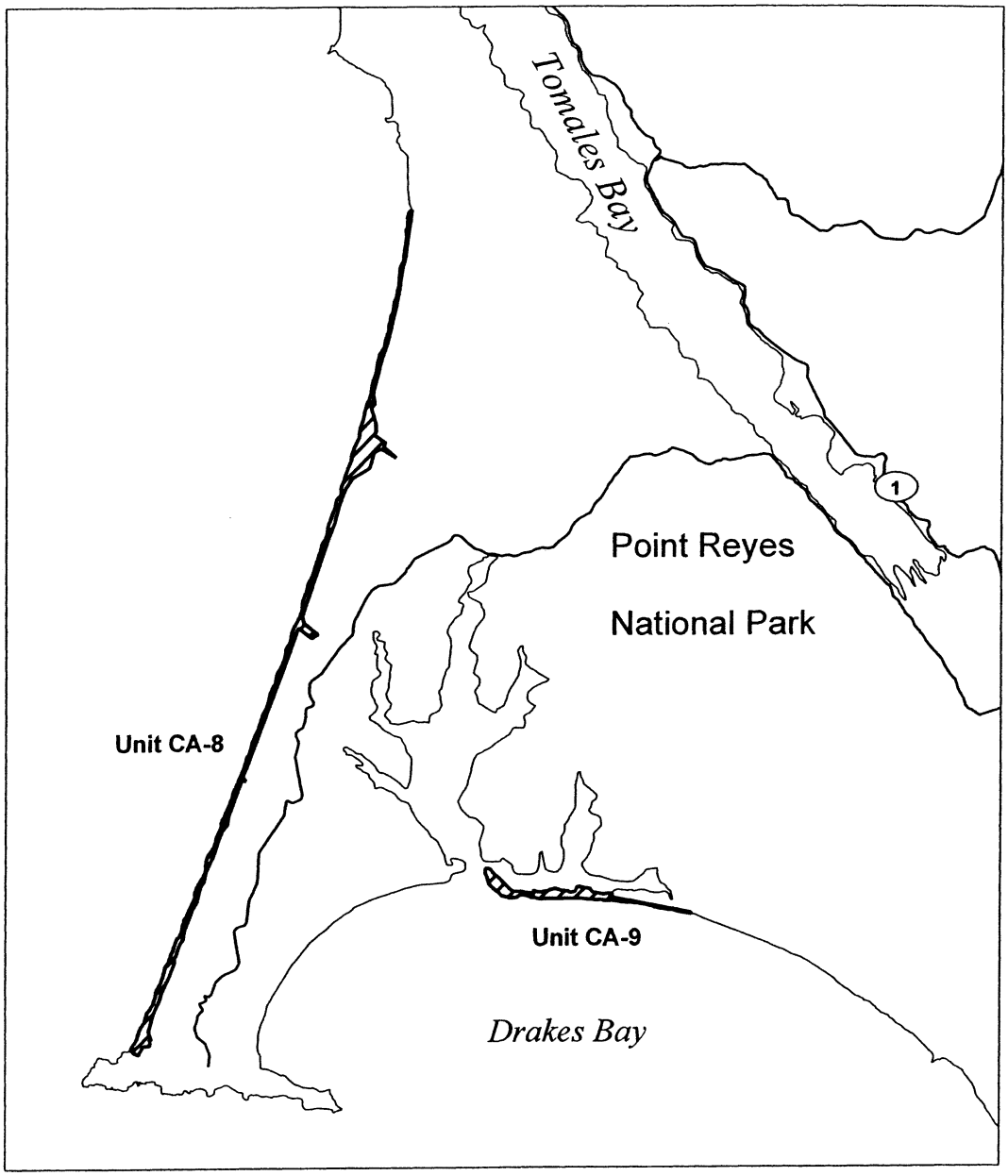

Map 23. Manchester Beach (CA-6), Mendocino County, California.
Pacific Ocean
Manchester Beach State Park
Alder Creek
Brush Creek
Garcia Creek
Unit CA-6
Manchester
Sea Lion Rocks
1
1
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
1 0 1 Miles
1 0 1 Kilometers
N

(27) Unit CA 8, Marin County, California.

(i) From USGS 1:24,000 quadrangle maps Tomales, and Drakes Bay, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 504572, 4222726; 504572, 4222726; 504614, 4222726; 504533, 4222176; 504474, 4221753; 504423, 4221606; 504323, 4220932; 504115, 4220064; 504015, 4219779; 503828, 4219017; 503862, 4218832; 503786, 4218734; 503872, 4218442; 503881, 4218252; 503864, 4218189; 504076, 4218038; 504054, 4217950; 504303, 4217736; 503996, 4217911; 503852, 4217840; 503755, 4217538; 503404, 4217327; 503248, 4217088; 503131, 4216783; 503063, 4216501; 502871, 4215990; 502578, 4215108; 502379, 4214536; 502420, 4214406; 502698, 4214160; 502576, 4214092; 502308, 4214311; 501984, 4213425; 501745, 4212755; 501458, 4211988; 501205, 4211284; 501258, 4211192; 501175, 4211211; 500930, 4210500; 500900, 4210342; 500793, 4210193; 500720, 4209996; 500637, 4209716; 500474, 4209346; 500433, 4209173; 500364, 4209049; 500289, 4208756; 500194, 4208591; 500009, 4208106; 499997, 4207982; 499943, 4207897; 499858, 4207658; 499821, 4207609; 499817, 4207502; 499707, 4207202; 499580, 4206933; 499511, 4206729; 499411, 4206501; 499306, 4206118; 499361, 4205940; 499323, 4205958; 499335, 4205836; 499191, 4205825; 499100, 4205651; 498998, 4205696; 498933, 4205752; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 504572, 4222726.

(ii) **Note:** Map of Unit CA 8 (Map M24) follows:

**Map 24.** Manchester Beach (CA-6), Mendocino County, California.

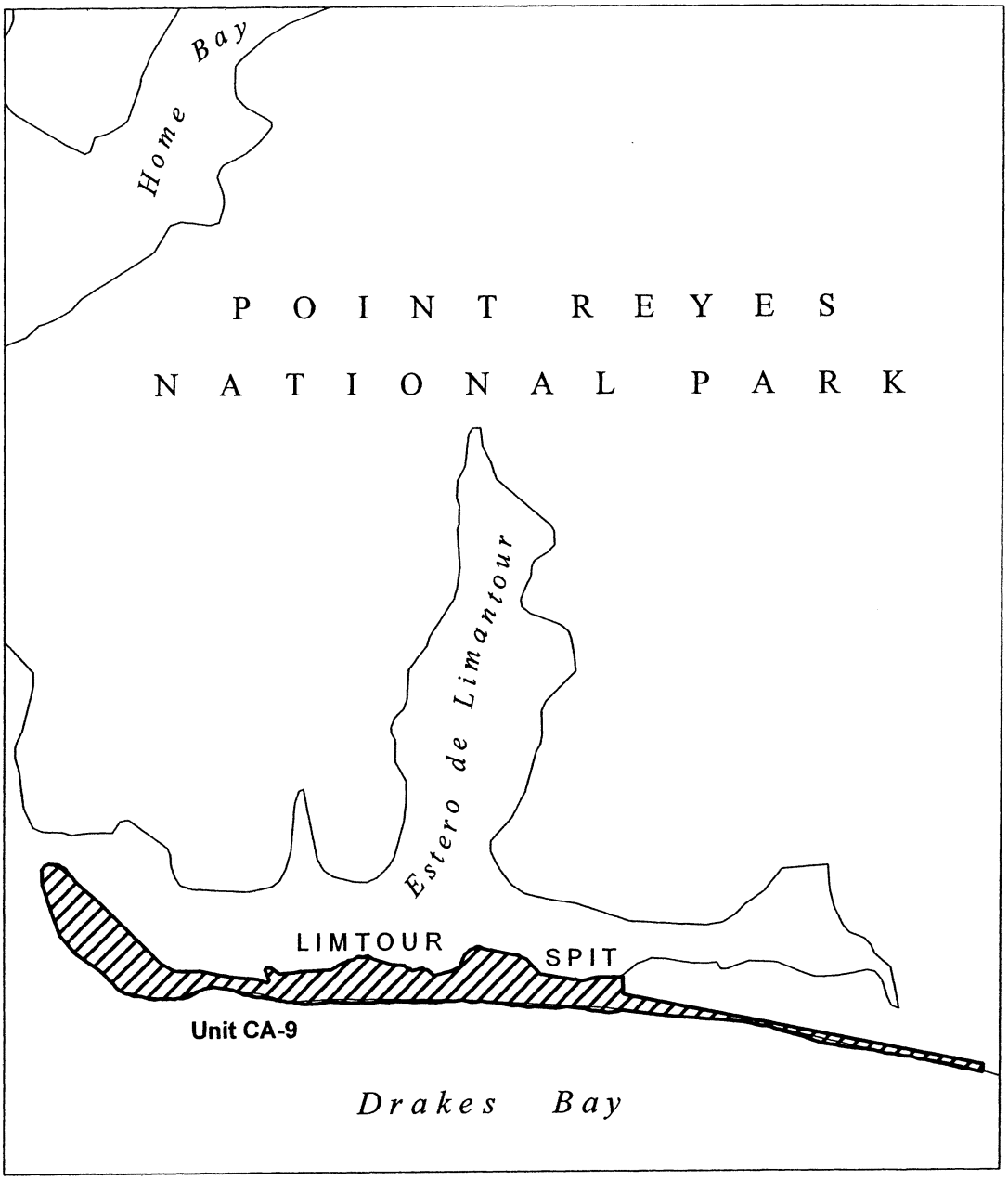


(28) Unit CA 9, Marin County, California.

(i) From USGS 1:24,000 quadrangle map Drakes Bay, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 506112, 4209385; 506127, 4209403; 506148, 4209411; 506156, 4209407; 506160, 4209409; 506164, 4209409; 506175, 4209409; 506181, 4209408; 506190, 4209406; 506199, 4209398; 506212, 4209393; 506224, 4209381; 506227, 4209377; 506236, 4209364; 506250, 4209351; 506258, 4209335; 506283, 4209313; 506304, 4209295; 506356, 4209248; 506636, 4208969; 506702, 4208934; 506808, 4208934; 506886, 4208919; 506941, 4208908; 507068, 4208896; 507113, 4208881; 507123, 4208888; 507103, 4208939; 507113, 4208949; 507123, 4208947; 507125, 4208947; 507125, 4208947; 507136, 4208944; 507169, 4208919; 507257, 4208926; 507262, 4208927; 507276, 4208929; 507278, 4208928; 507398, 4208937; 507451, 4208967; 507465, 4208969; 507473, 4208976; 507475, 4208978; 507479, 4208977; 507486, 4208976; 507497, 4208980; 507504, 4208982; 507509, 4208988; 507513, 4208990; 507524, 4208995; 507539, 4208993; 507554, 4208995; 507557, 4208996; 507564, 4208994; 507571, 4208993; 507588, 4208983; 507672, 4208957; 507725, 4208955; 507734, 4208948; 507740, 4208941; 507742, 4208942; 507745, 4208943; 507754, 4208938; 507759, 4208931; 507809, 4208942; 507821, 4208933; 507826, 4208934; 507829, 4208935; 507833, 4208930; 507835, 4208929; 507838, 4208927; 507841, 4208925; 507848, 4208920; 507853, 4208911; 507860, 4208908; 507934, 4208927; 507969, 4208945; 507995, 4209003; 508011, 4209013; 508013, 4209018; 508016, 4209019; 508030, 4209025; 508047, 4209034; 508048, 4209035; 508050, 4209034; 508068, 4209029; 508081, 4209024; 508098, 4209021; 508101, 4209019; 508150, 4209009; 508228, 4208993; 508269, 4208978; 508305, 4208939; 508313, 4208932; 508315, 4208928; 508330, 4208912; 508483, 4208887; 508485, 4208887; 508500, 4208884; 508513, 4208881; 508589, 4208894; 508691, 4208894; 508700, 4208902; 508700, 4208822; 510301, 4208503; 510301, 4208469; 510275, 4208473; 510258, 4208478; 510237, 4208484; 510228, 4208485; 510202, 4208487; 510165, 4208496; 510134, 4208505; 510112, 4208510; 510072, 4208518; 510040, 4208527; 510006, 4208529; 509977, 4208540; 509963, 4208543; 509958, 4208543; 509938, 4208546; 509898, 4208553; 509862, 4208555; 509851, 4208558; 509835, 4208563; 509824, 4208566; 509802, 4208571; 509778, 4208576; 509750, 4208578; 509731, 4208579; 509680, 4208585; 509627, 4208595; 509577, 4208604; 509563, 4208609; 509555, 4208612; 509539, 4208617; 509508, 4208629; 509462, 4208642; 509448, 4208645; 509439, 4208647; 509429, 4208648; 509392, 4208661; 509385, 4208663; 509347, 4208677; 509308, 4208680; 509279, 4208688; 509258, 4208693; 509232, 4208697; 509196, 4208700; 509178, 4208701; 508902, 4208724; 508704, 4208751; 508696, 4208750; 508682, 4208746; 508665, 4208742; 508632, 4208740; 508601, 4208747; 508577, 4208748; 508560, 4208749; 508545, 4208753; 508525, 4208758; 508498, 4208761; 508450, 4208766; 508431, 4208764; 508396, 4208761; 508350, 4208763; 508347, 4208763; 508312, 4208768; 508275, 4208767; 508237, 4208774; 508216, 4208775; 508199, 4208775; 508178, 4208779; 508166, 4208782; 508150, 4208784; 508134, 4208786; 508100, 4208789; 508095, 4208789; 508065, 4208793; 508056, 4208793; 508019, 4208789; 507980, 4208798; 507948, 4208793; 507920, 4208793; 507910, 4208794; 507867, 4208789; 507821, 4208791; 507775, 4208790; 507763, 4208792; 507743, 4208793; 507736, 4208794; 507690, 4208795; 507651, 4208792; 507617, 4208793; 507611, 4208793; 507605, 4208792; 507602, 4208792; 507576, 4208790; 507547, 4208791; 507539, 4208791; 507487, 4208789; 507446, 4208791; 507393, 4208795; 507338, 4208787; 507282, 4208785; 507236, 4208792; 507235, 4208792; 507221, 4208796; 507202, 4208794; 507189, 4208799; 507180, 4208798; 507152, 4208804; 507140, 4208807; 507117, 4208812; 507104, 4208816; 507089, 4208816; 507071, 4208816; 507066, 4208818; 507040, 4208823; 507038, 4208824; 507007, 4208830; 507001, 4208833; 506975, 4208844; 506962, 4208850; 506875, 4208863; 506828, 4208855; 506821, 4208851; 506817, 4208849; 506799, 4208840; 506780, 4208829; 506759, 4208821; 506739, 4208815; 506738, 4208815; 506712, 4208815; 506711, 4208816; 506702, 4208812; 506675, 4208814; 506663, 4208811; 506659, 4208810; 506655, 4208811; 506640, 4208813; 506636, 4208814; 506624, 4208811; 506608, 4208809; 506582, 4208814; 506547, 4208824; 506518, 4208825; 506486, 4208836; 506484, 4208838; 506477, 4208840; 506457, 4208849; 506439, 4208863; 506434, 4208871; 506430, 4208877; 506423, 4208885; 506417, 4208891; 506409, 4208895; 506397, 4208910; 506367, 4208941; 506262, 4209015; 506194, 4209093; 506158, 4209192; 506115, 4209314; and returning to 506112, 4209385.

(ii) **Note:** Map of Unit CA 9 (Map M25) follows:

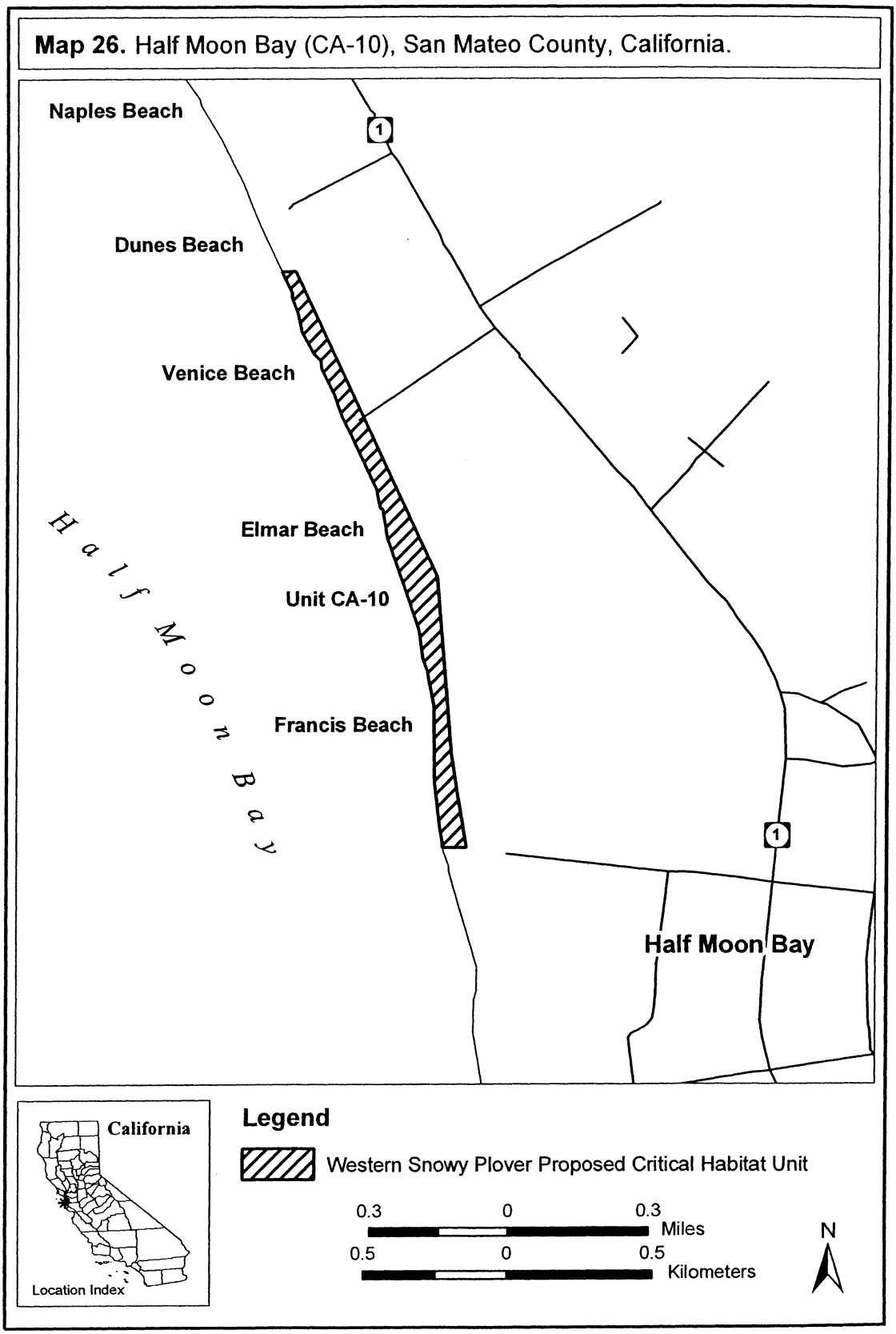
**Map 25.** Limantour Spit (CA-9), Marin County, California.



(29) Unit CA 10, San Mateo County, California.

(i) From USGS 1:24,000 quadrangle map Half Moon Bay, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 548431, 4148414; 548480, 4148414; 548972, 4147370; 549024, 4146767; 549079, 4146435; 548995, 4146435; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 548431, 4148414.

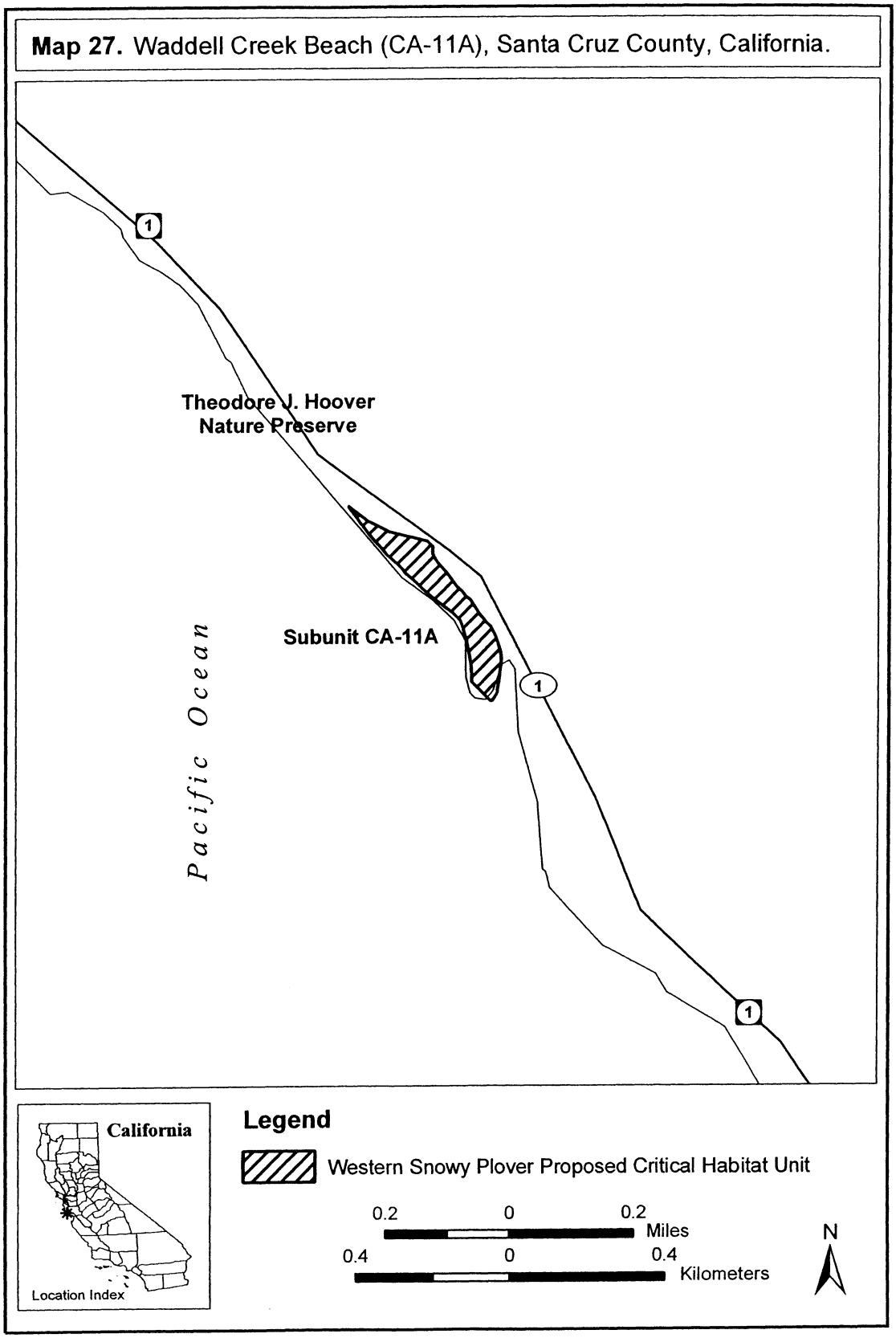
(ii) **Note:** Map of Unit CA 10 (Map M26) follows:


Map 26. Half Moon Bay (CA-10), San Mateo County, California.
Naples Beach
Dunes Beach
Venice Beach
Elmar Beach
Unit CA-10
Francis Beach
Half Moon Bay
1
1
Half Moon Bay
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.3 0 0.3
Miles
0.5 0 0.5
Kilometers
N

(30) Unit CA 11A, Santa Cruz County, California.

(i) From USGS 1:24,000 quadrangle map Ano Nuevo, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 564392, 4105215; 564379, 4105194; 564373, 4105195; 564326, 4105243; 564324, 4105252; 564324, 4105263; 564324, 4105285; 564319, 4105310; 564313, 4105344; 564310, 4105355; 564303, 4105380; 564295, 4105401; 564287, 4105409; 564275, 4105421; 564247, 4105442; 564236, 4105451; 564232, 4105454; 564226, 4105459; 564212, 4105471; 564207, 4105475; 564181, 4105500; 564173, 4105507; 564153, 4105525; 564145, 4105535; 564137, 4105544; 564104, 4105574; 564086, 4105594; 564072, 4105611; 564068, 4105616; 564041, 4105649; 564025, 4105671; 564013, 4105687; 564006, 4105696; 564007, 4105697; 564059, 4105657; 564114, 4105629; 564210, 4105606; 564224, 4105591; 564223, 4105587; 564223, 4105573; 564228, 4105565; 564239, 4105548; 564250, 4105535; 564261, 4105521; 564272, 4105509; 564284, 4105491; 564300, 4105478; 564307, 4105467; 564310, 4105464; 564320, 4105457; 564333, 4105437; 564335, 4105434; 564348, 4105415; 564352, 4105411; 564363, 4105397; 564376, 4105385; 564385, 4105367; 564395, 4105341; 564401, 4105321; 564403, 4105300; 564401, 4105280; 564400, 4105273; 564397, 4105249; 564392, 4105215; returning to 564392, 4105215.

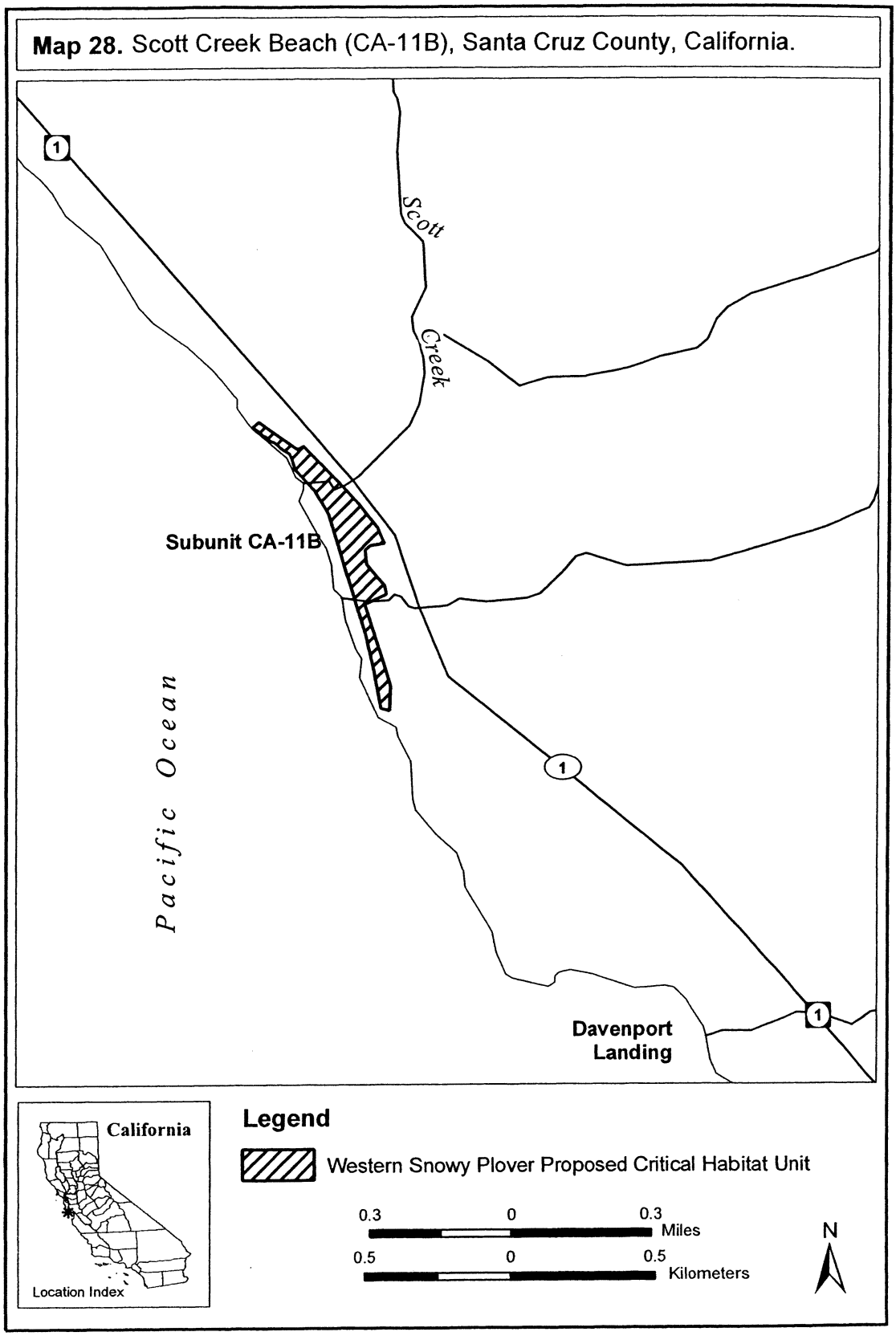
(ii) **Note:** Map of Unit CA 11A (Map M27) follows:


Map 27. Waddell Creek Beach (CA-11A), Santa Cruz County, California.
1
Theodore J. Hoover
Nature Preserve
Subunit CA-11A
Pacific Ocean
1
1
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.2 0 0.2
Miles
0.4 0 0.4
Kilometers
N

(31) Unit CA 11B, Santa Cruz County, California.

(i) From USGS 1:24,000 quadrangle map Davenport, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 568335, 4099623; 568357, 4099641; 568491, 4099548; 568511, 4099559; 568644, 4099426; 568705, 4099359; 568766, 4099278; 568789, 4099227; 568743, 4099219; 568725, 4099203; 568732, 4099154; 568793, 4099079; 568797, 4099050; 568724, 4099017; 568788, 4098813; 568812, 4098739; 568810, 4098648; 568780, 4098657; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 568335, 4099623.

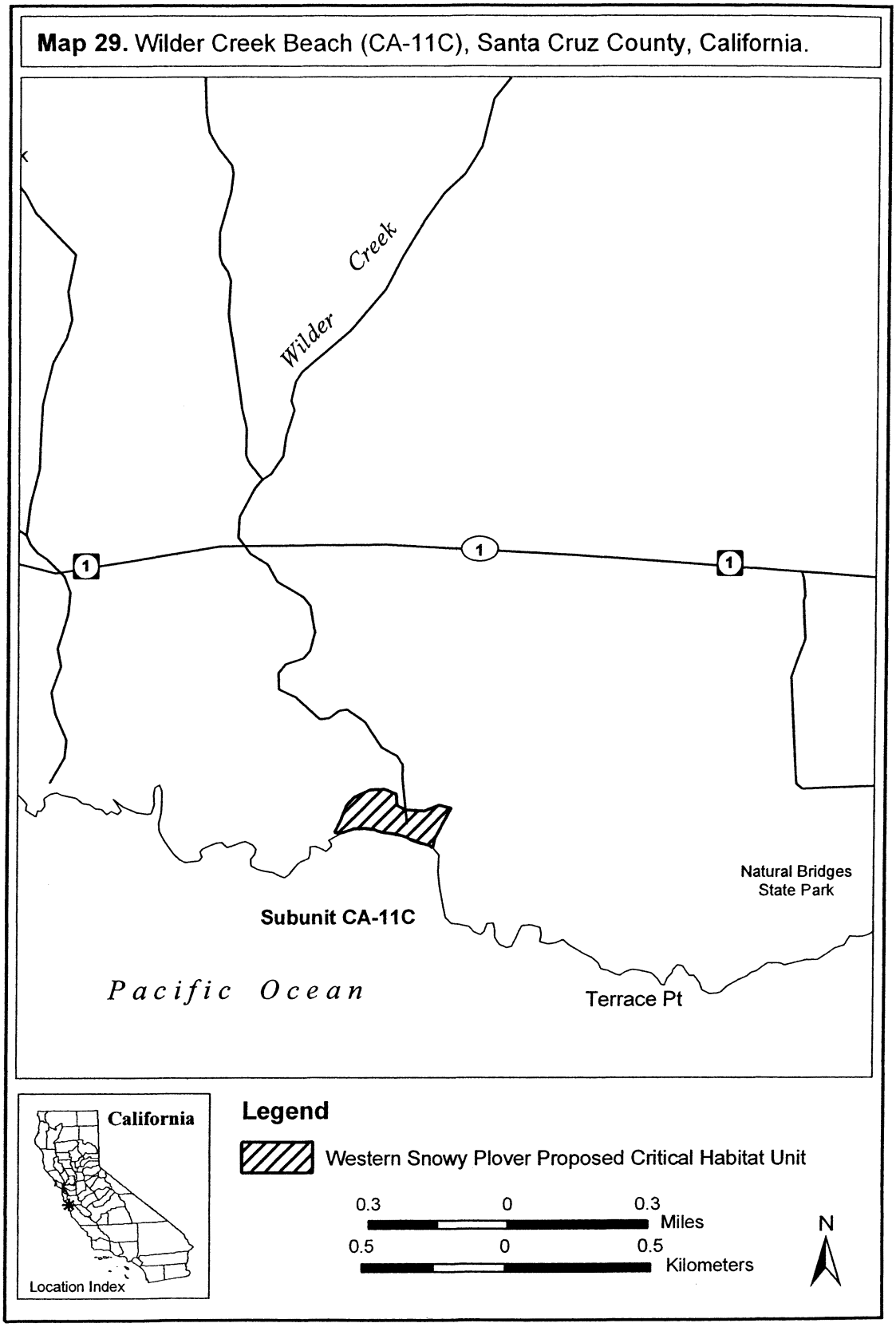
(ii) **Note:** Map of Unit CA 11B (Map M28) follows:


Map 28. Scott Creek Beach (CA-11B), Santa Cruz County, California.
1
Scott
Creek
Subunit CA-11B
Pacific Ocean
1
1
Davenport
Landing
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.3
0
0.3
Miles
0.5
0
0.5
Kilometers
N

(32) Unit CA 11C, Santa Cruz County, California.

(i) From USGS 1:24,000 quadrangle map Santa Cruz, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 581976, 4089882; 581995, 4089920; 582016, 4089973; 582043, 4090004; 582099, 4090029; 582146, 4090031; 582186, 4090014; 582190, 4089975; 582220, 4089960; 582286, 4089956; 582339, 4089976; 582379, 4089965; 582325, 4089864; 582317, 4089828; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 581976, 4089882.

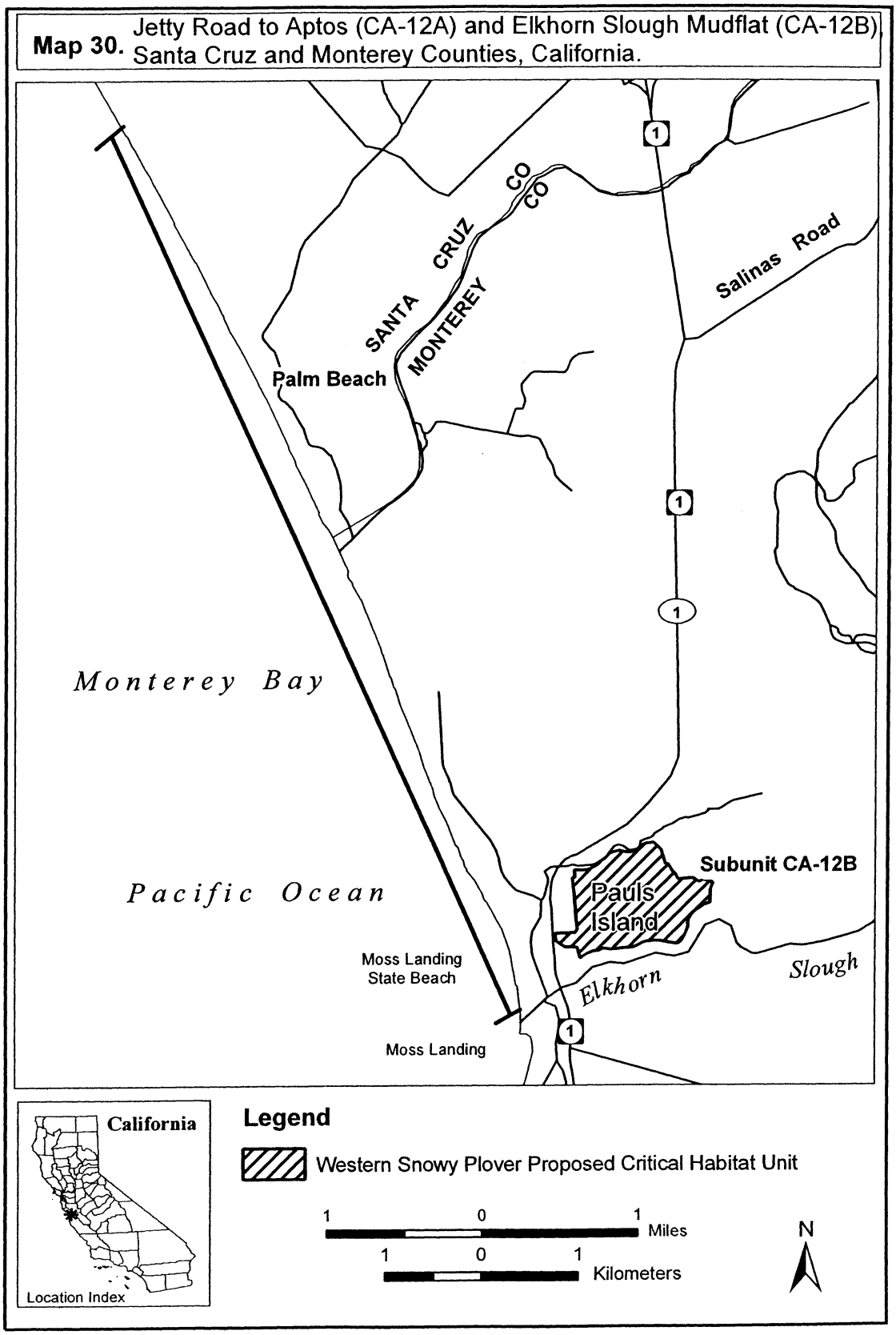
(ii) **Note:** Map of Unit CA 11C (Map M29) follows:


Map 29. Wilder Creek Beach (CA-11C), Santa Cruz County, California.
Wilder Creek
1
1
1
Natural Bridges State Park
Subunit CA-11C
Pacific Ocean
Terrace Pt
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.3 0 0.3
Miles
0.5 0 0.5
Kilometers
N

(33) Unit CA 12B, Monterey County, California.

(i) From USGS 1:24,000 quadrangle map Moss Landing, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 608763, 4074606; 608691, 4074563; 608670, 4074673; 608584, 4074676; 608543, 4074678; 608446, 4074735; 608439, 4074818; 608641, 4074826; 608664, 4074856; 608625, 4075263; 608614, 4075389; 608635, 4075389; 608631, 4075470; 608729, 4075467; 608787, 4075475; 608845, 4075503; 608883, 4075530; 608927, 4075571; 608956, 4075595; 608997, 4075637; 609048, 4075659; 609093, 4075666; 609168, 4075653; 609218, 4075654; 609270, 4075672; 609344, 4075728; 609380, 4075742; 609451, 4075750; 609528, 4075677; 609566, 4075533; 609597, 4075526; 609642, 4075452; 609672, 4075419; 609693, 4075383; 609709, 4075374; 609746, 4075376; 609782, 4075377; 609817, 4075380; 609856, 4075384; 609882, 4075367; 609917, 4075348; 609958, 4075367; 609985, 4075364; 610013, 4075359; 610058, 4075336; 610029, 4075268; 610029, 4075128; 609963, 4075106; 609930, 4075084; 609878, 4075050; 609842, 4075010; 609817, 4074970; 609801, 4074919; 609802, 4074868; 609786, 4074834; 609768, 4074794; 609748, 4074758; 609727, 4074728; 609705, 4074713; 609656, 4074713; 609581, 4074728; 609517, 4074739; 609454, 4074739; 609391, 4074732; 609351, 4074722; 609319, 4074708; 609280, 4074688; 609244, 4074671; 609173, 4074665; 609007, 4074650; 608939, 4074661; 608892, 4074643; 608840, 4074635; returning to 608763, 4074606.

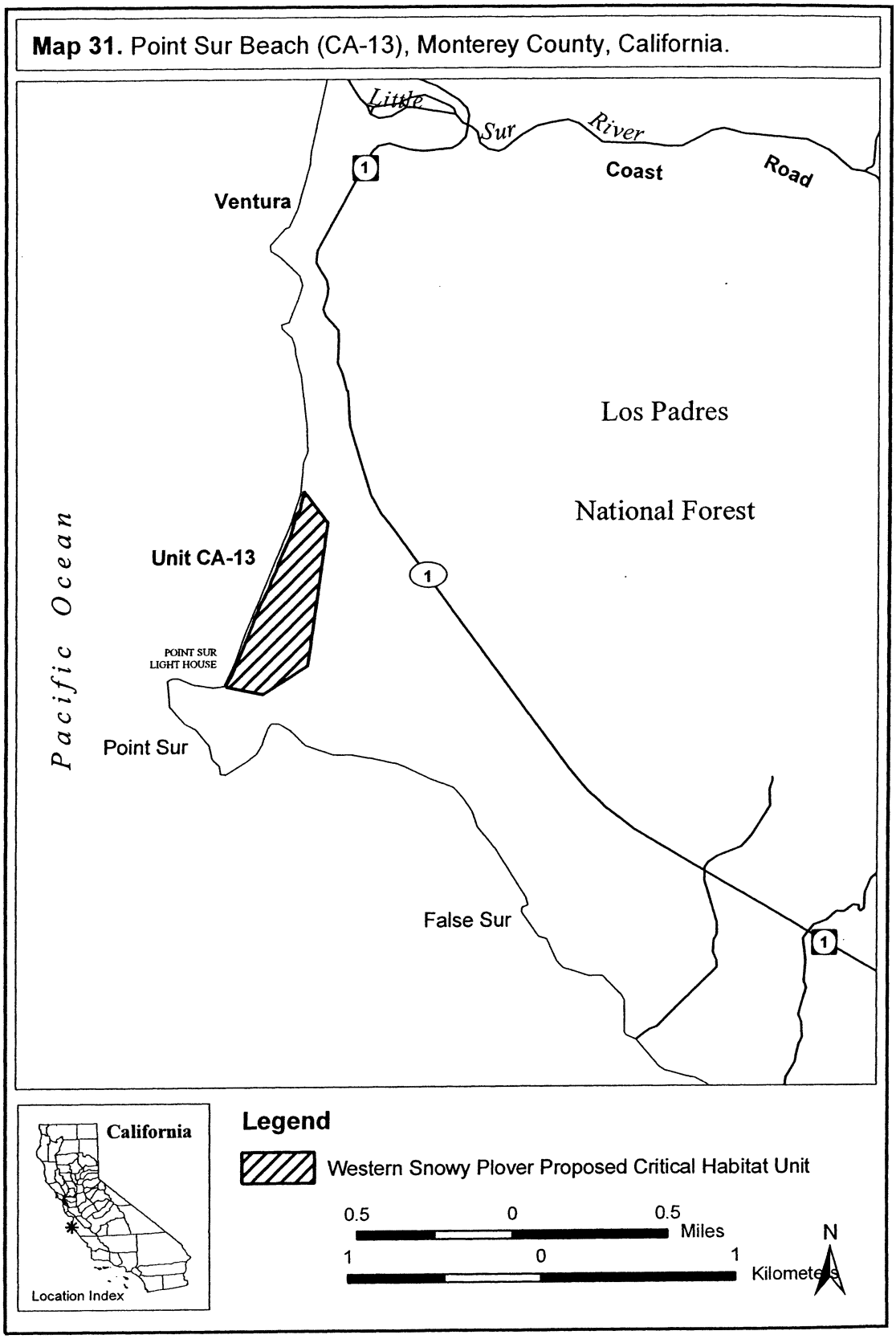
(ii) **Note:** Map of Unit CA 12B (Map M30) follows:


Map 30. Jetty Road to Aptos (CA-12A) and Elkhorn Slough Mudflat (CA-12B), Santa Cruz and Monterey Counties, California.
SANTA CRUZ CO
MONTEREY CO
Salinas Road
Palm Beach
Monterey Bay
Pacific Ocean
Subunit CA-12B
Pauls Island
Moss Landing State Beach
Elkhorn Slough
Moss Landing
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
1 0 1 Miles
1 0 1 Kilometers
N

(34) Unit CA 13, Monterey County, California.

(i) From USGS 1:24,000 quadrangle map Point Sur, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 599299, 4019363; 599421, 4019200; 599320, 4018471; 599091, 4018323; 598903, 4018365; 598903, 4018365; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 599299, 4019363.

(ii) **Note:** Map of Unit CA 13 (Map M31) follows:

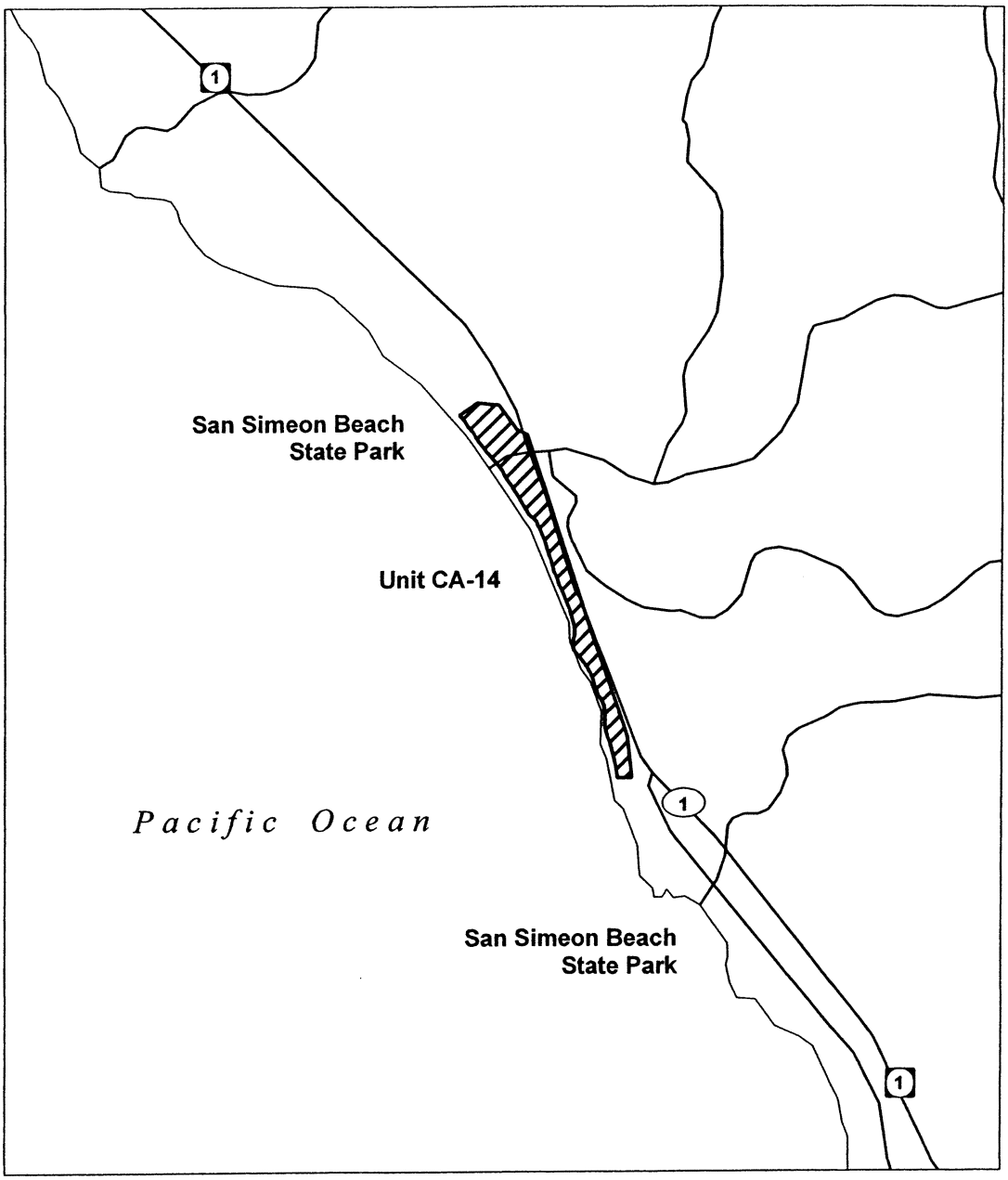

Map 31. Point Sur Beach (CA-13), Monterey County, California.
Little
Sur
River
Coast
Road
Ventura
1
Los Padres
National Forest
Unit CA-13
Pacific Ocean
POINT SUR
LIGHT HOUSE
Point Sur
False Sur
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.5 0 0.5
Miles
1 0 1
Kilometers
N

(35) Unit CA 14, San Luis Obispo County, California.

(i) From USGS 1:24,000 quadrangle maps Pico Creek, and San Luis Obispo, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 669618, 3940622; 669684, 3940666; 669759, 3940658; 669823, 3940570; 669860, 3940553; 670111, 3939799; 670221, 3939478; 670238, 3939332; 670183, 3939330; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 669618, 3940622.

(ii) **Note:** Map of Unit CA 14 (Map M32) follows:

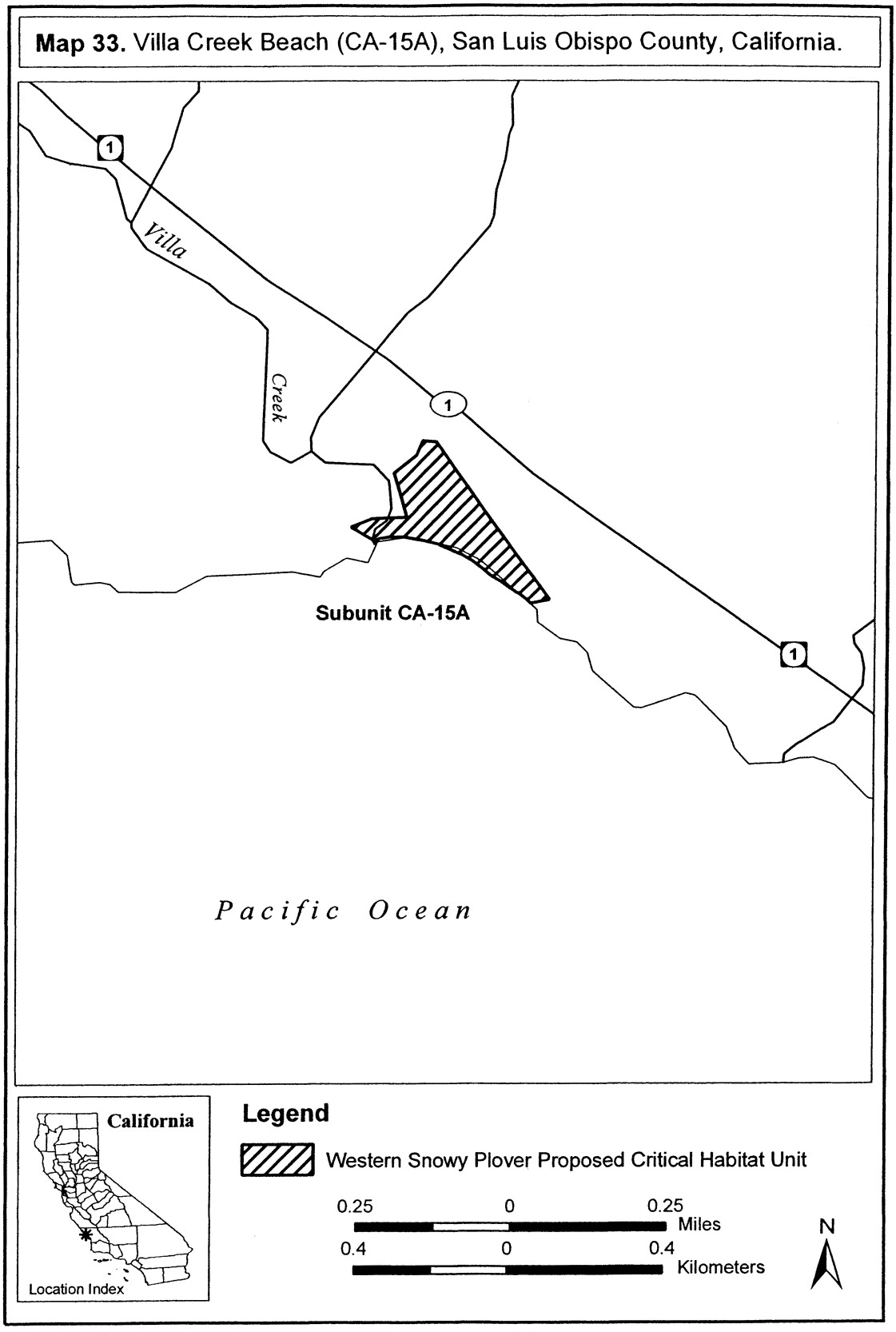
**Map 32.** San Simeon Beach (CA-14), San Luis Obispo County, California.



(36) Unit CA 15A, San Luis Obispo County, California.

(i) From USGS 1:24,000 quadrangle map Cayucos, California, land bounded by the following UTM 10 NAD 27 coordinates (E,N): 684204, 3925805; 684260, 3925827; 684349, 3925831; 684316, 3925944; 684374, 3925990; 684389, 3926027; 684425, 3926024; 684453, 3925985; 684721, 3925617; 684671, 3925608; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 684204, 3925805.

(ii) **Note:** Map of Unit CA 15A (Map M33) follows:

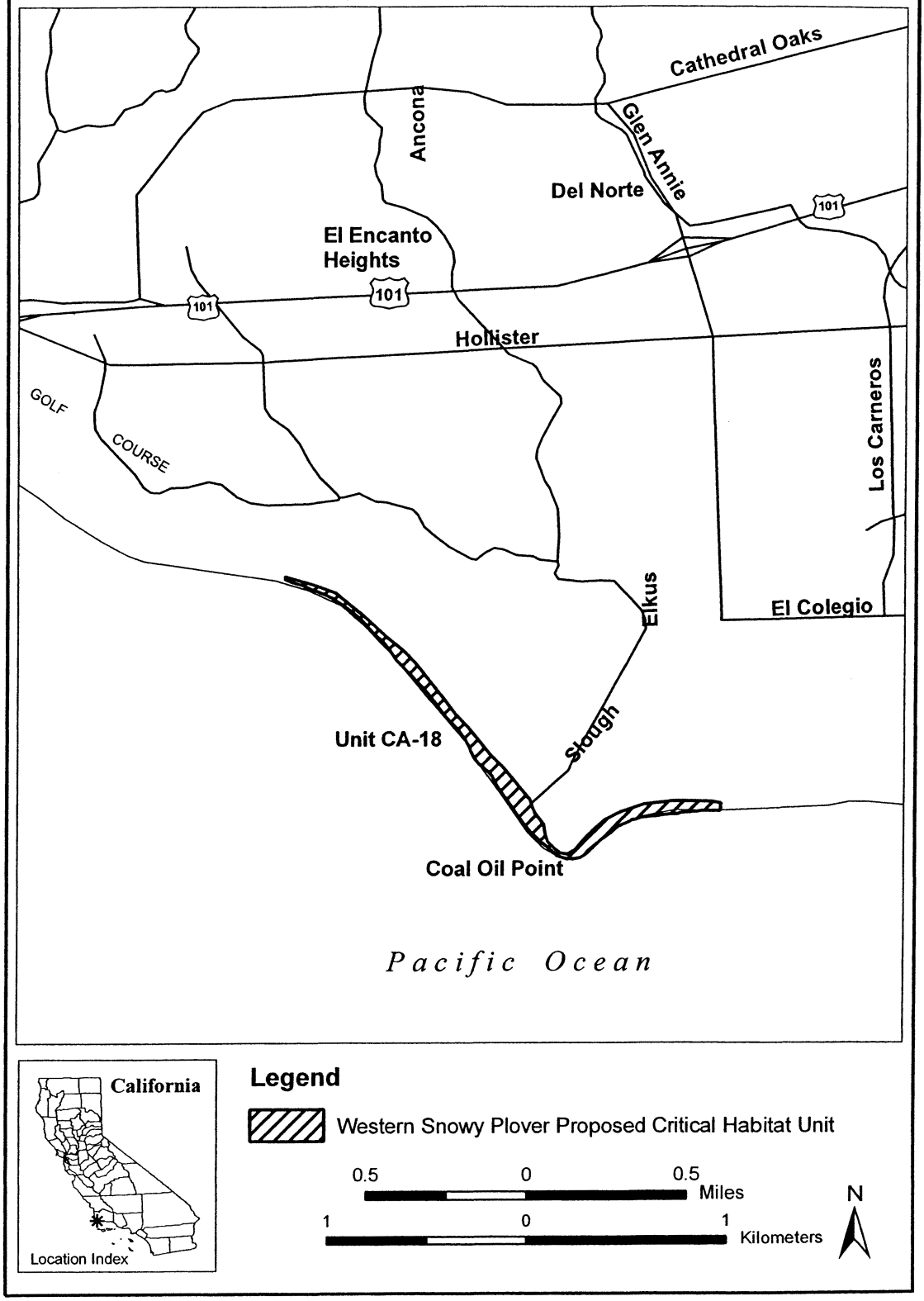

Map 33. Villa Creek Beach (CA-15A), San Luis Obispo County, California.
1
Villa
Creek
1
Subunit CA-15A
1
Pacific Ocean
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.25
0
0.25
Miles
0.4
0
0.4
Kilometers
N

(37) Unit CA 18, Santa Barbara County, California.

(i) From USGS 1:24,000 quadrangle maps Dos Pueblos Canyon, and Goleta, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 234194, 3812313; 234195, 3812330; 234324, 3812283; 234446, 3812230; 234583, 3812107; 234686, 3812003; 234773, 3811918; 234823, 3811862; 234938, 3811694; 235005, 3811597; 235067, 3811524; 235171, 3811381; 235232, 3811310; 235359, 3811141; 235381, 3811072; 235424, 3811010; 235428, 3810963; 235437, 3810924; 235477, 3810884; 235498, 3810866; 235532, 3810858; 235570, 3810877; 235592, 3810897; 235616, 3810922; 235681, 3810981; 235729, 3811016; 235817, 3811054; 235933, 3811084; 236074, 3811089; 236175, 3811083; 236270, 3811077; 236314, 3811067; 236310, 3811029; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 234194, 3812313.

(ii) **Note:** Map of Unit CA 18 (Map M34) follows:

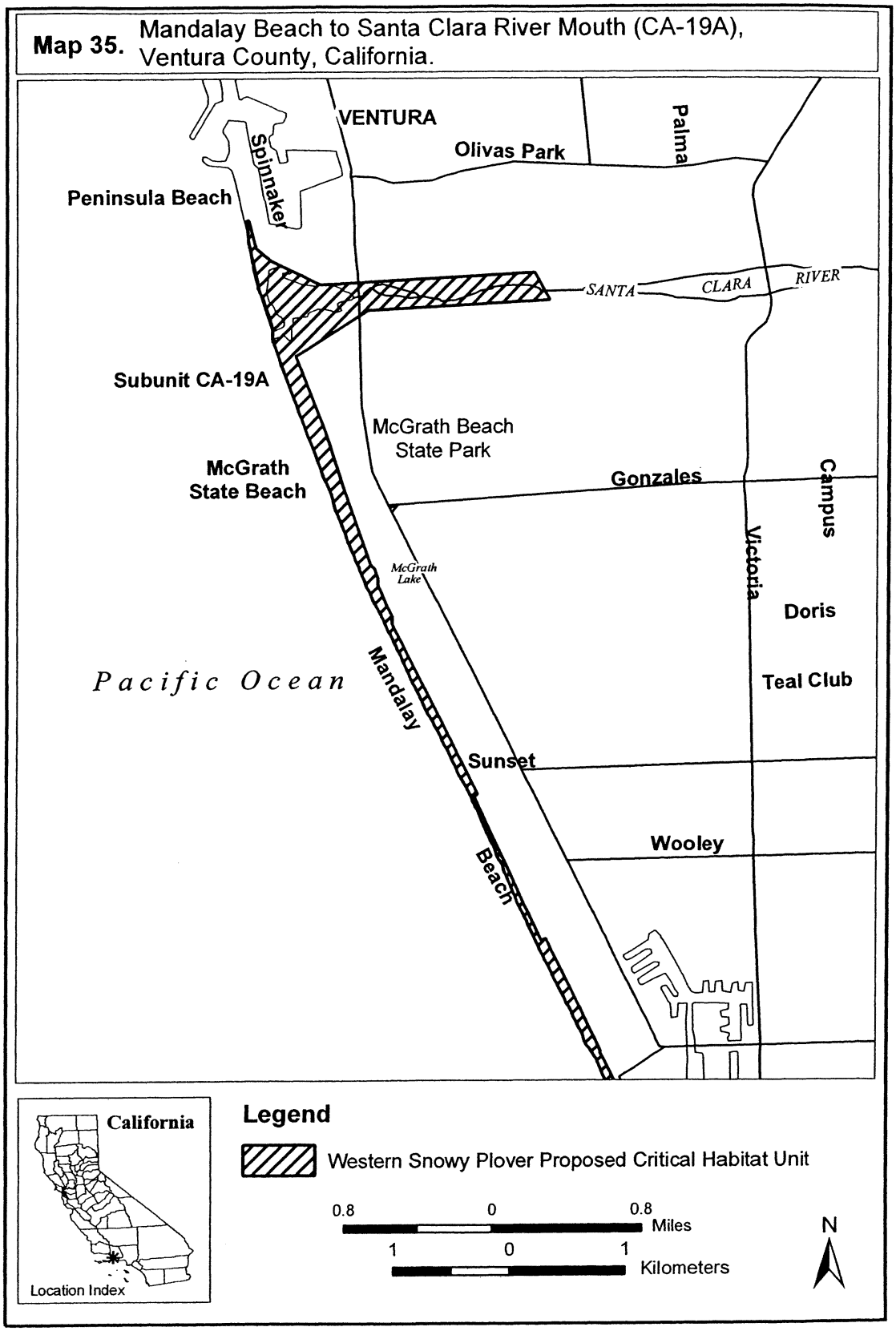
**Map 34.** Devereaux Beach (CA-18), Santa Barbara County, California.



(38) Unit CA 19A, Ventura County, California.

(i) From USGS 1:24,000 quadrangle map Oxnard, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 291536, 3790654; 291943, 3790429; 293789, 3790422; 293909, 3790178; 292342, 3790186; 291693, 3789833; 291920, 3789159; 292048, 3788658; 292238, 3788005; 292271, 3787968; 292297, 3787886; 292292, 3787826; 292351, 3787673; 292404, 3787548; 292400, 3787482; 292954, 3786197; 293048, 3785979; 293018, 3785959; 293526, 3784688; 293569, 3784701; 293823, 3784111; 293981, 3783717; 293983, 3783693; 294439, 3782668; 294526, 3782458; 294707, 3782195; 294760, 3782104; 294683, 3782108; 294704, 3782086; 294750, 3781994; 294787, 3781952; 294852, 3781838; 294879, 3781802; 294729, 3781717; 294723, 3781760; 294713, 3781782; 294699, 3781800; 294676, 3781817; 294671, 3781819; 294650, 3781827; 294631, 3781835; 294604, 3781838; 294585, 3781849; 294568, 3781857; 294557, 3781878; 294553, 3781896; 294547, 3781922; 294544, 3781941; 294543, 3781964; 294543, 3781984; 294545, 3782006; 294549, 3782032; 294548, 3782058; 294542, 3782084; 294541, 3782090; 294535, 3782125; 294526, 3782156; 294514, 3782192; 294504, 3782226; 294498, 3782242; 294495, 3782249; 294489, 3782267; 294477, 3782306; 294463, 3782352; 294448, 3782403; 294434, 3782462; 294429, 3782477; 294420, 3782507; 294402, 3782554; 294389, 3782595; 294376, 3782626; 294351, 3782682; 294331, 3782729; 294314, 3782773; 294285, 3782829; 294273, 3782855; 294256, 3782890; 294239, 3782923; 294225, 3782962; 294208, 3783001; 294187, 3783054; 294180, 3783080; 294166, 3783116; 294149, 3783150; 294139, 3783176; 294130, 3783215; 294115, 3783248; 294099, 3783272; 294085, 3783303; 294074, 3783348; 294060, 3783377; 294040, 3783411; 294010, 3783460; 293994, 3783498; 293976, 3783551; 293962, 3783594; 293942, 3783648; 293922, 3783688; 293908, 3783715; 293898, 3783734; 293878, 3783755; 293874, 3783759; 293870, 3783763; 293864, 3783782; 293863, 3783783; 293855, 3783808; 293843, 3783854; 293829, 3783891; 293814, 3783926; 293794, 3783965; 293770, 3784021; 293761, 3784045; 293741, 3784092; 293716, 3784137; 293697, 3784189; 293677, 3784240; 293652, 3784289; 293623, 3784357; 293610, 3784393; 293588, 3784443; 293572, 3784479; 293561, 3784499; 293545, 3784529; 293527, 3784573; 293506, 3784617; 293486, 3784667; 293471, 3784713; 293448, 3784768; 293427, 3784825; 293410, 3784866; 293401, 3784887; 293385, 3784930; 293360, 3784986; 293337, 3785035; 293322, 3785078; 293314, 3785099; 293304, 3785127; 293286, 3785175; 293271, 3785215; 293256, 3785255; 293254, 3785261; 293240, 3785292; 293233, 3785328; 293230, 3785340; 293229, 3785342; 293224, 3785361; 293214, 3785382; 293213, 3785384; 293203, 3785400; 293191, 3785431; 293176, 3785478; 293174, 3785482; 293171, 3785492; 293158, 3785530; 293149, 3785548; 293144, 3785558; 293142, 3785562; 293120, 3785619; 293106, 3785651; 293096, 3785681; 293092, 3785691; 293084, 3785711; 293070, 3785746; 293066, 3785755; 293066, 3785757; 293055, 3785792; 293042, 3785823; 293023, 3785874; 293004, 3785916; 292989, 3785962; 292970, 3786005; 292947, 3786059; 292927, 3786101; 292916, 3786121; 292910, 3786135; 292902, 3786150; 292885, 3786181; 292872, 3786223; 292862, 3786258; 292848, 3786284; 292840, 3786303; 292825, 3786340; 292816, 3786363; 292800, 3786391; 292798, 3786395; 292792, 3786403; 292786, 3786410; 292785, 3786412; 292782, 3786419; 292775, 3786441; 292774, 3786443; 292764, 3786469; 292755, 3786493; 292725, 3786558; 292709, 3786595; 292709, 3786598; 292697, 3786625; 292681, 3786656; 292680, 3786658; 292676, 3786663; 292670, 3786673; 292666, 3786678; 292655, 3786700; 292654, 3786703; 292642, 3786740; 292634, 3786761; 292631, 3786772; 292628, 3786779; 292618, 3786802; 292609, 3786822; 292598, 3786846; 292590, 3786864; 292588, 3786870; 292581, 3786889; 292575, 3786906; 292568, 3786919; 292563, 3786931; 292562, 3786932; 292553, 3786951; 292552, 3786953; 292532, 3787000; 292512, 3787049; 292505, 3787071; 292494, 3787099; 292481, 3787132; 292478, 3787139; 292470, 3787163; 292452, 3787219; 292430, 3787265; 292425, 3787276; 292416, 3787297; 292400, 3787337; 292384, 3787381; 292380, 3787388; 292371, 3787404; 292371, 3787405; 292364, 3787417; 292343, 3787473; 292338, 3787485; 292337, 3787488; 292321, 3787526; 292297, 3787585; 292296, 3787588; 292295, 3787588; 292272, 3787635; 292243, 3787694; 292216, 3787767; 292196, 3787815; 292177, 3787876; 292159, 3787920; 292157, 3787926; 292153, 3787937; 292146, 3787962; 292136, 3787992; 292124, 3788022; 292122, 3788027; 292115, 3788043; 292095, 3788098; 292090, 3788116; 292077, 3788155; 292076, 3788157; 292076, 3788158; 292057, 3788206; 292055, 3788211; 292053, 3788216; 292048, 3788237; 292038, 3788270; 292023, 3788314; 292018, 3788330; 292002, 3788380; 291991, 3788411; 291986, 3788424; 291974, 3788463; 291968, 3788483; 291953, 3788529; 291952, 3788534; 291947, 3788560; 291943, 3788587; 291933, 3788636; 291931, 3788640; 291916, 3788679; 291897, 3788731; 291875, 3788782; 291856, 3788846; 291832, 3788928; 291818, 3788975; 291818, 3788976; 291813, 3788995; 291807, 3789010; 291807, 3789010; 291792, 3789048; 291766, 3789118; 291751, 3789171; 291739, 3789208; 291738, 3789212; 291717, 3789279; 291703, 3789322; 291696, 3789346; 291681, 3789395; 291671, 3789432; 291671, 3789434; 291665, 3789455; 291661, 3789464; 291652, 3789484; 291510, 3789962; 291510, 3789967; 291507, 3790007; 291508, 3790019; 291510, 3790052; 291509, 3790065; 291508, 3790095; 291505, 3790118; 291499, 3790142; 291490, 3790179; 291482, 3790214; 291470, 3790249; 291468, 3790254; 291456, 3790296; 291447, 3790332; 291431, 3790369; 291421, 3790398; 291419, 3790406; 291417, 3790413; 291414, 3790433; 291406, 3790485; 291387, 3790625; 291374, 3790687; 291368, 3790723; 291362, 3790759; 291358, 3790792; 291351, 3790831; 291349, 3790865; 291348, 3790900; 291344, 3790941; 291340, 3790980; 291336, 3791004; 291335, 3791012; 291362, 3791013; 291410, 3790772; 291536, 3790654; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 291536, 3790654.

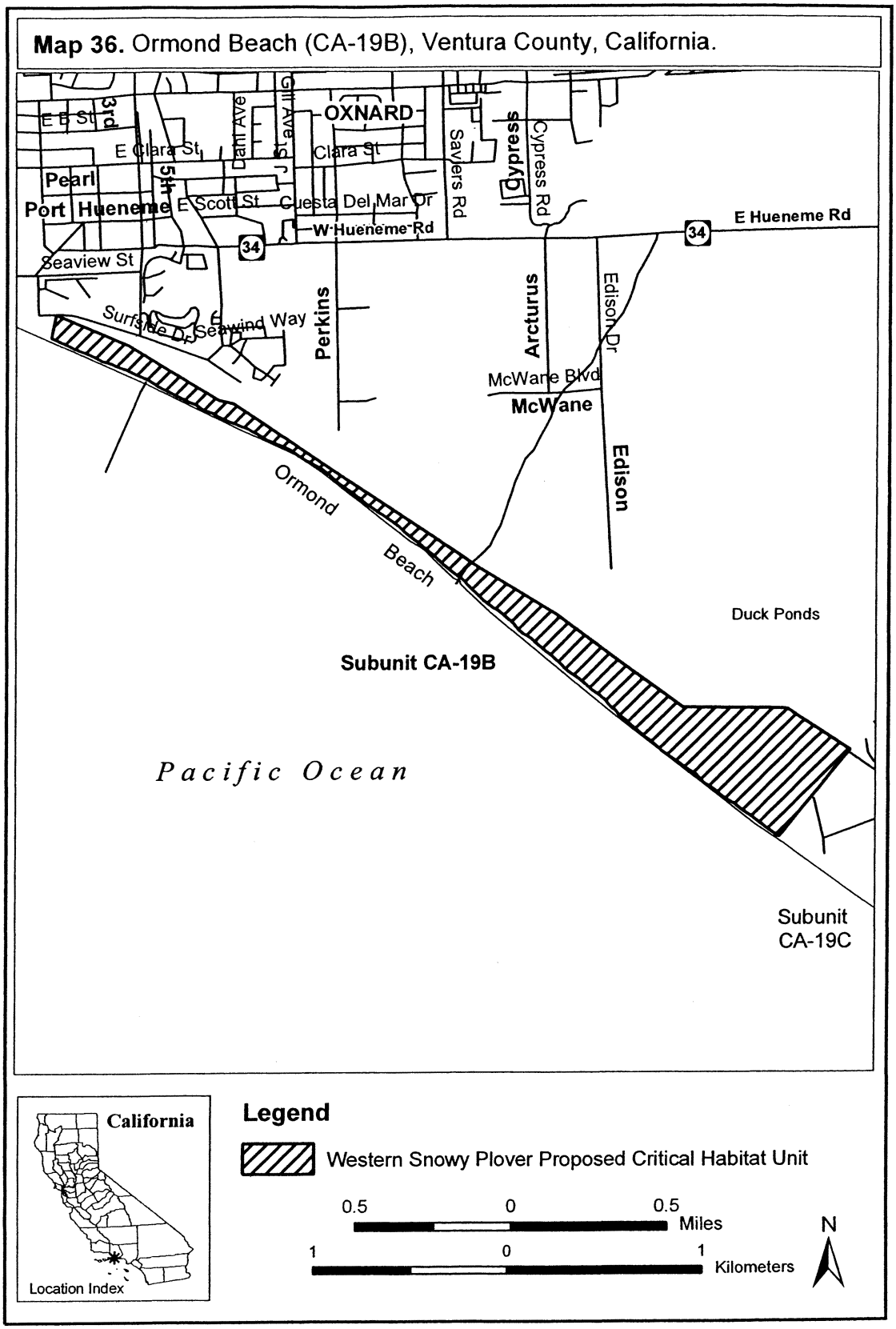
(ii) **Note:** Map of Unit CA 19A (Map M35) follows:


Map 35. Mandalay Beach to Santa Clara River Mouth (CA-19A), Ventura County, California.
VENTURA
Olivas Park
Palma
Spinnaker
Peninsula Beach
SANTA CLARA RIVER
Subunit CA-19A
McGrath Beach State Park
McGrath State Beach
Gonzales
Campus
Victoria
McGrath Lake
Doris
Pacific Ocean
Mandalay
Teal Club
Sunset
Wooley
Beach
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.8 0 0.8 Miles
1 0 1 Kilometers
N

(39) Unit CA 19B, Ventura County, California.

(i) From USGS 1:24,000 quadrangle maps Oxnard, and Point Magu, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 301219, 3777693; 300831, 3777265; 300825, 3777270; 300806, 3777284; 300783, 3777305; 300751, 3777332; 300731, 3777349; 300698, 3777377; 300669, 3777400; 300643, 3777423; 300614, 3777448; 300567, 3777480; 300539, 3777504; 300514, 3777529; 300495, 3777545; 300468, 3777563; 300449, 3777582; 300422, 3777615; 300388, 3777639; 300367, 3777657; 300344, 3777676; 300326, 3777689; 300306, 3777706; 300289, 3777719; 300273, 3777733; 300255, 3777748; 300226, 3777778; 300207, 3777796; 300191, 3777809; 300174, 3777824; 300156, 3777841; 300139, 3777858; 300117, 3777878; 300081, 3777914; 300048, 3777944; 300039, 3777958; 300028, 3777971; 300018, 3777978; 299997, 3778002; 299978, 3778030; 299954, 3778052; 299937, 3778067; 299917, 3778082; 299885, 3778114; 299854, 3778146; 299827, 3778167; 299800, 3778187; 299773, 3778211; 299761, 3778227; 299739, 3778248; 299711, 3778277; 299687, 3778297; 299657, 3778325; 299637, 3778346; 299615, 3778366; 299579, 3778392; 299550, 3778418; 299529, 3778447; 299511, 3778468; 299494, 3778483; 299474, 3778503; 299455, 3778521; 299431, 3778534; 299401, 3778560; 299376, 3778579; 299357, 3778601; 299334, 3778630; 299313, 3778649; 299295, 3778670; 299271, 3778701; 299262, 3778707; 299243, 3778722; 299213, 3778747; 299194, 3778765; 299174, 3778786; 299144, 3778817; 299117, 3778840; 299089, 3778867; 299053, 3778901; 299018, 3778932; 298985, 3778961; 298957, 3778991; 298930, 3779014; 298897, 3779041; 298864, 3779067; 298836, 3779090; 298801, 3779115; 298770, 3779144; 298729, 3779181; 298683, 3779218; 298660, 3779236; 298620, 3779280; 298584, 3779310; 298559, 3779328; 298505, 3779359; 298474, 3779379; 298431, 3779413; 298396, 3779434; 298365, 3779448; 298317, 3779471; 298289, 3779490; 298266, 3779506; 298243, 3779519; 298216, 3779537; 298200, 3779545; 298189, 3779550; 298164, 3779563; 298122, 3779582; 298080, 3779603; 298042, 3779629; 298000, 3779648; 297961, 3779678; 297913, 3779700; 297864, 3779729; 297819, 3779758; 297771, 3779784; 297727, 3779819; 297691, 3779838; 297656, 3779855; 297613, 3779877; 297567, 3779900; 297534, 3779917; 297494, 3779932; 297453, 3779953; 297404, 3779980; 297359, 3780001; 297309, 3780030; 297242, 3780065; 297270, 3780182; 297633, 3780001; 298075, 3779695; 298150, 3779675; 299371, 3778748; 299746, 3778489; 300378, 3777964; 300888, 3777929; 300911, 3777924; 300923, 3777917; 300936, 3777908; 300956, 3777892; 301219, 3777693; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 301219, 3777693.

(ii) **Note:** Map of Unit CA 19B (Map M36) follows:

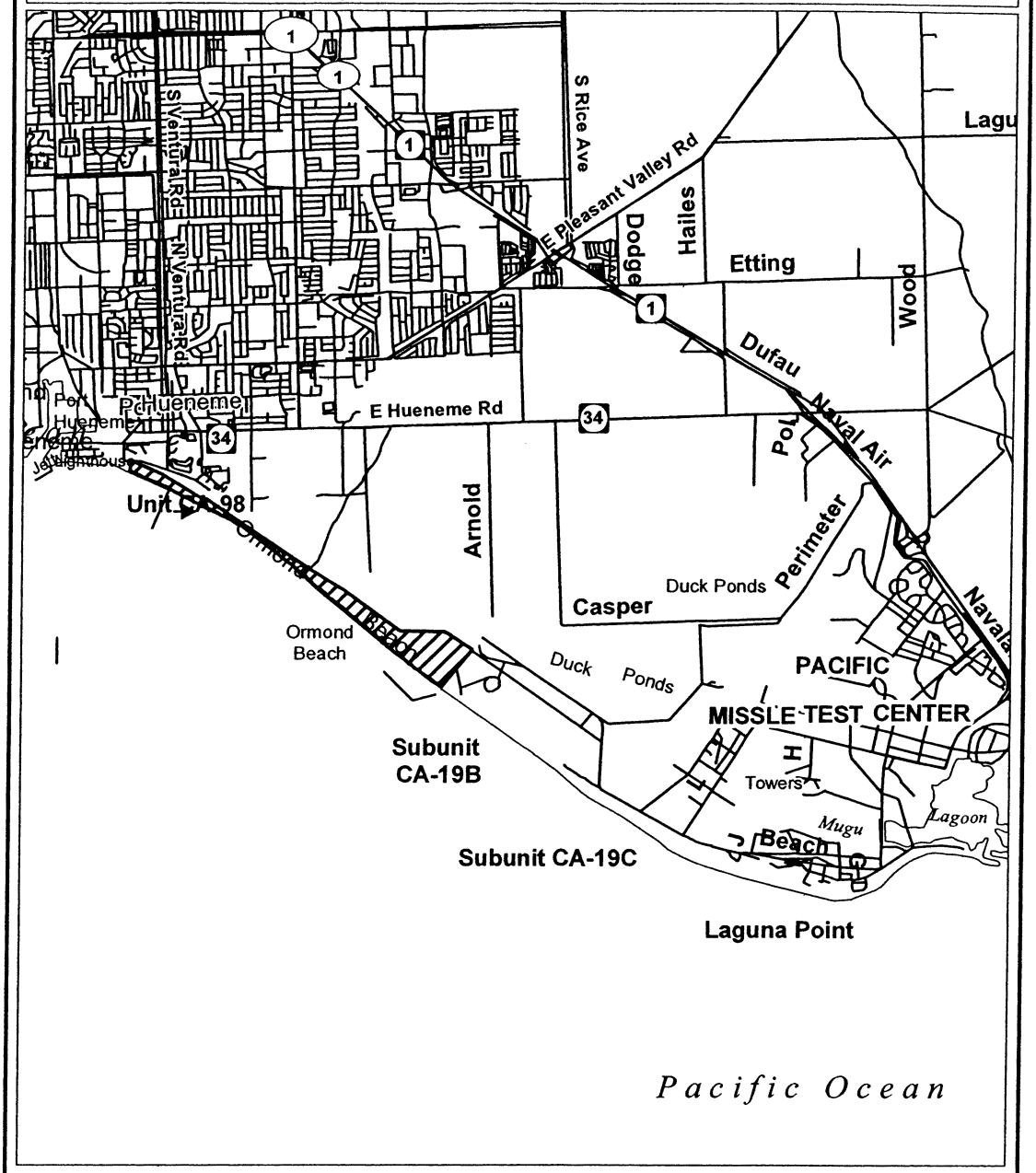

Map 36. Ormond Beach (CA-19B), Ventura County, California.
OXNARD
E B St
E Clara St
Clara St
Pearl
Port Hueneme
E Scott St
Cuesta Del Mar Dr
W Hueneme Rd
E Hueneme Rd
34
Seaview St
Surfside Dr
Seawind Way
Perkins
Arcturus
Edison Dr
McWane Blvd
McWane
Edison
Ormond Beach
Duck Ponds
Subunit CA-19B
Pacific Ocean
Subunit CA-19C
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.5 0 0.5
Miles
1 0 1
Kilometers
N

(40) Unit CA 19D, Ventura County, California.

(i) From USGS 1:24,000 quadrangle map Point Magu, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 309410, 3773725; 309460, 3773796; 309560, 3773719; 309596, 3773763; 309661, 3773726; 309714, 3773654; 309836, 3773503; 309847, 3773468; 309815, 3773441; 309804, 3773452; 309784, 3773467; 309774, 3773475; 309772, 3773477; 309751, 3773495; 309739, 3773506; 309712, 3773523; 309698, 3773533; 309676, 3773549; 309673, 3773550; 309661, 3773558; 309630, 3773578; 309589, 3773607; 309578, 3773614; 309530, 3773650; 309488, 3773677; 309462, 3773692; 309445, 3773703; 309433, 3773711; 309410, 3773725; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 309410, 3773725.

(ii) **Note:** Map of Unit CA 19D (Map M37) follows:

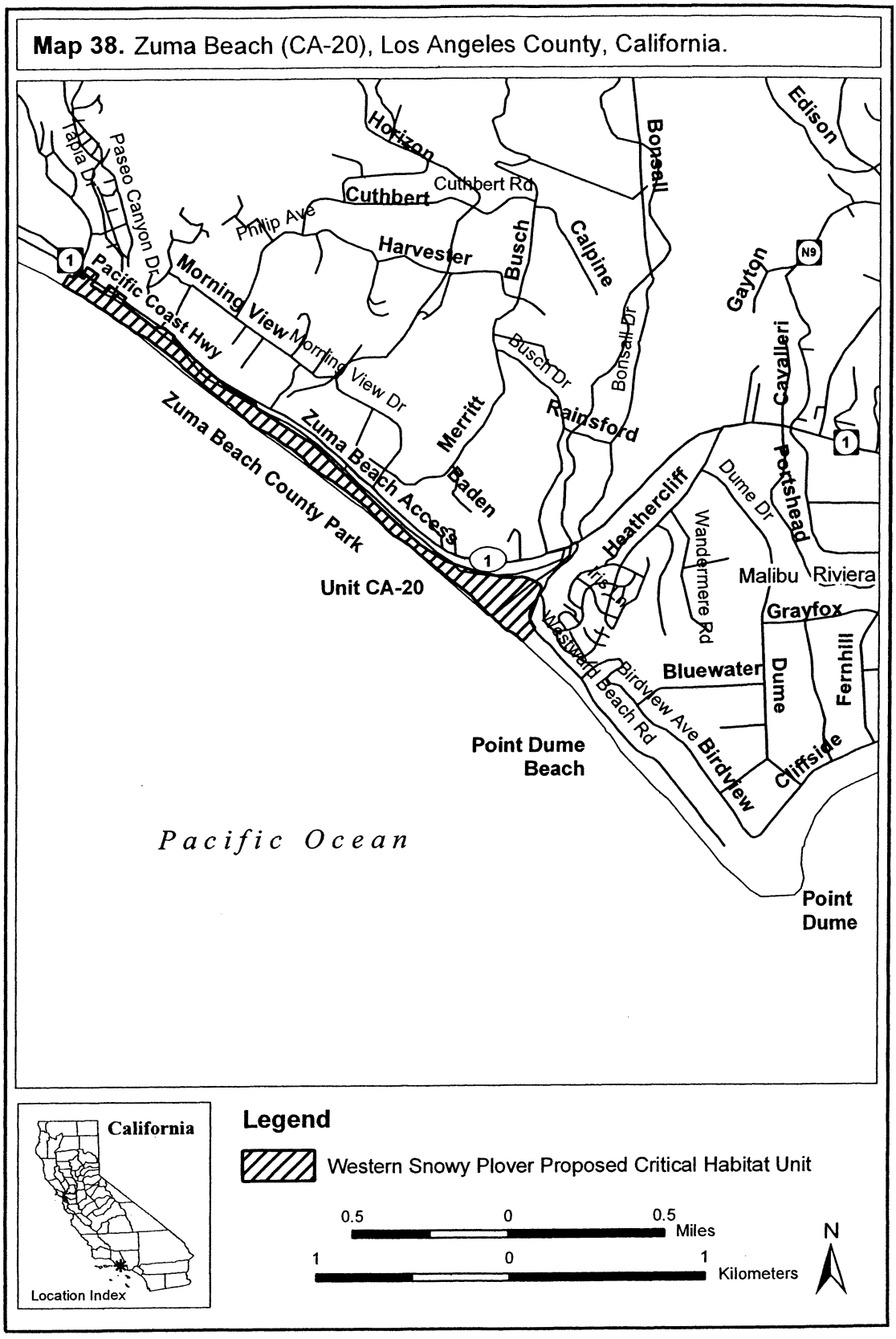
**Map 37.** Magu Lagoon, South (CA-19D), Ventura County, California.



(41) Unit CA 20, Los Angeles County, California.

(i) From USGS 1:24,000 quadrangle map Point Dume, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 329965, 3766877; 329924, 3766830; 329985, 3766786; 330017, 3766822; 330095, 3766754; 330094, 3766751; 330084, 3766734; 330081, 3766721; 330155, 3766656; 330233, 3766591; 330253, 3766588; 330272, 3766589; 330283, 3766586; 330337, 3766538; 330324, 3766526; 330377, 3766467; 330388, 3766467; 330428, 3766419; 330503, 3766346; 330597, 3766260; 330733, 3766164; 330734, 3766150; 330742, 3766140; 330970, 3765974; 331003, 3765952; 331025, 3765933; 331045, 3765912; 331281, 3765663; 331539, 3765394; 331669, 3765298; 331791, 3765248; 331956, 3765199; 331981, 3765198; 332021, 3765195; 332052, 3765196; 332076, 3765189; 332121, 3765165; 332140, 3765152; 332146, 3765142; 332147, 3765126; 332122, 3765074; 332087, 3765013; 332081, 3764993; 332081, 3764972; 332083, 3764966; 332099, 3764935; 332103, 3764929; 332037, 3764863; 332019, 3764880; 332003, 3764895; 331988, 3764908; 331973, 3764917; 331965, 3764922; 331957, 3764927; 331930, 3764951; 331913, 3764969; 331904, 3764979; 331897, 3764986; 331886, 3764999; 331883, 3765003; 331882, 3765004; 331876, 3765009; 331858, 3765025; 331836, 3765051; 331813, 3765078; 331797, 3765098; 331783, 3765116; 331774, 3765125; 331755, 3765144; 331738, 3765158; 331724, 3765168; 331683, 3765204; 331643, 3765243; 331640, 3765246; 331605, 3765278; 331589, 3765293; 331588, 3765294; 331564, 3765319; 331527, 3765350; 331486, 3765395; 331456, 3765417; 331433, 3765432; 331404, 3765452; 331401, 3765454; 331400, 3765455; 331389, 3765467; 331365, 3765493; 331361, 3765497; 331325, 3765542; 331299, 3765572; 331275, 3765604; 331248, 3765627; 331243, 3765631; 331212, 3765659; 331178, 3765688; 331147, 3765713; 331108, 3765746; 331070, 3765774; 331036, 3765797; 331035, 3765798; 331012, 3765818; 331009, 3765820; 330986, 3765838; 330962, 3765871; 330937, 3765897; 330904, 3765925; 330878, 3765944; 330853, 3765961; 330827, 3765983; 330795, 3766008; 330764, 3766026; 330752, 3766032; 330739, 3766039; 330732, 3766043; 330711, 3766057; 330706, 3766060; 330681, 3766090; 330679, 3766091; 330667, 3766104; 330663, 3766107; 330653, 3766117; 330644, 3766126; 330643, 3766127; 330629, 3766143; 330604, 3766172; 330587, 3766179; 330579, 3766181; 330573, 3766186; 330368, 3766380; 330365, 3766384; 330348, 3766403; 330328, 3766422; 330321, 3766428; 330279, 3766466; 330236, 3766502; 330207, 3766528; 330173, 3766550; 330136, 3766569; 330105, 3766597; 330085, 3766611; 330070, 3766624; 330023, 3766660; 330022, 3766661; 330018, 3766664; 330010, 3766673; 329969, 3766702; 329962, 3766707; 329960, 3766708; 329937, 3766727; 329911, 3766747; 329888, 3766766; 329882, 3766771; 329847, 3766792; 329813, 3766815; 329785, 3766836; 329781, 3766839; 329816, 3766887; 329836, 3766875; 329851, 3766892; 329890, 3766865; 329899, 3766877; 329886, 3766885; 329912, 3766923; 329924, 3766912; 329965, 3766877; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 329965, 3766877.

(ii) **Note:** Map of Unit CA 20 (Map M38) follows:

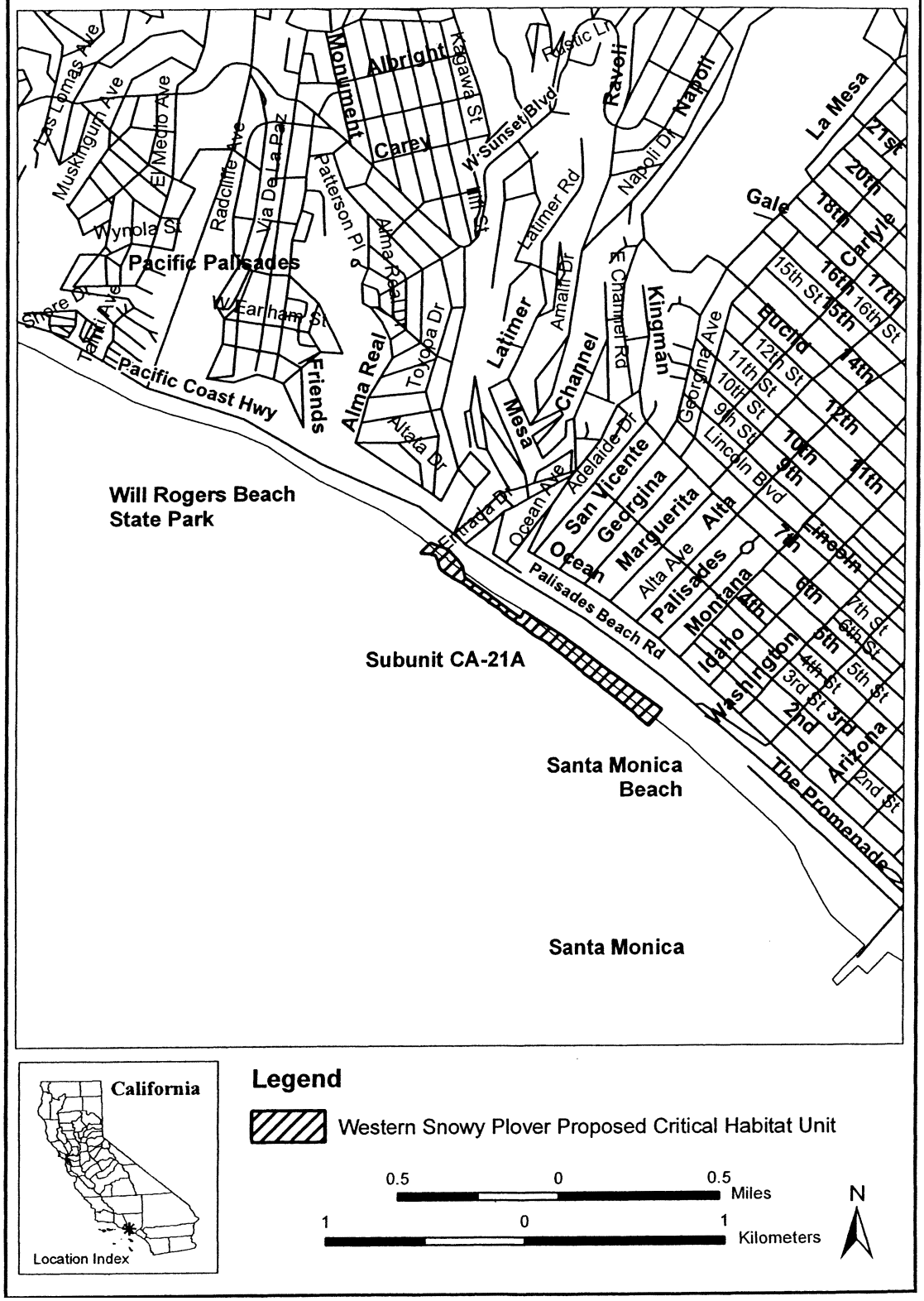

Map 38. Zuma Beach (CA-20), Los Angeles County, California.
Tapia Dr
Paseo Canyon Dr
Horizon
Cuthbert
Cuthbert Rd
Phillip Ave
Harvester
Busch
Calpine
Bonsall
Edison
Gayton
N9
Pacific Coast Hwy
Morning View
Morning View Dr
Busch Dr
Bonsall Dr
Cavalleri
Merritt
Rainsford
Zuma Beach County Park
Zuma Beach Access
Baden
Heathercliff
Dume Dr
Portshead
Wandermere Rd
Malibu Riviera
Unit CA-20
Iris Ln
Grayfox
Westward Beach Rd
Bluewater
Birdview Ave
Dume
Fernhill
Birdview
Cliffside
Point Dume Beach
Pacific Ocean
Point Dume
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.5 0 0.5 Miles
1 0 1 Kilometers
N

(42) Unit CA 21A, Los Angeles County, California.

(i) From USGS 1:24,000 quadrangle map Topanga, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 359653, 3766064; 359698, 3766104; 359706, 3766112; 359794, 3766072; 359841, 3766016; 359865, 3765980; 359868, 3765955; 359871, 3765928; 359981, 3765838; 360136, 3765710; 360156, 3765737; 360157, 3765740; 360346, 3765605; 360713, 3765301; 360821, 3765208; 360782, 3765167; 360750, 3765131; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 359653, 3766064.

(ii) **Note:** Map of Units CA 21A (Map M39) follows:

**Map 39.** Santa Monica Beach (CA-21A), Los Angeles County, California.



(43) Unit CA 21B, Los Angeles County, California.

(i) From USGS 1:24,000 quadrangle map Venice, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 366261, 3757311; 366467, 3757409; 366791, 3756716; 366577, 3756633; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 366261, 3757311.

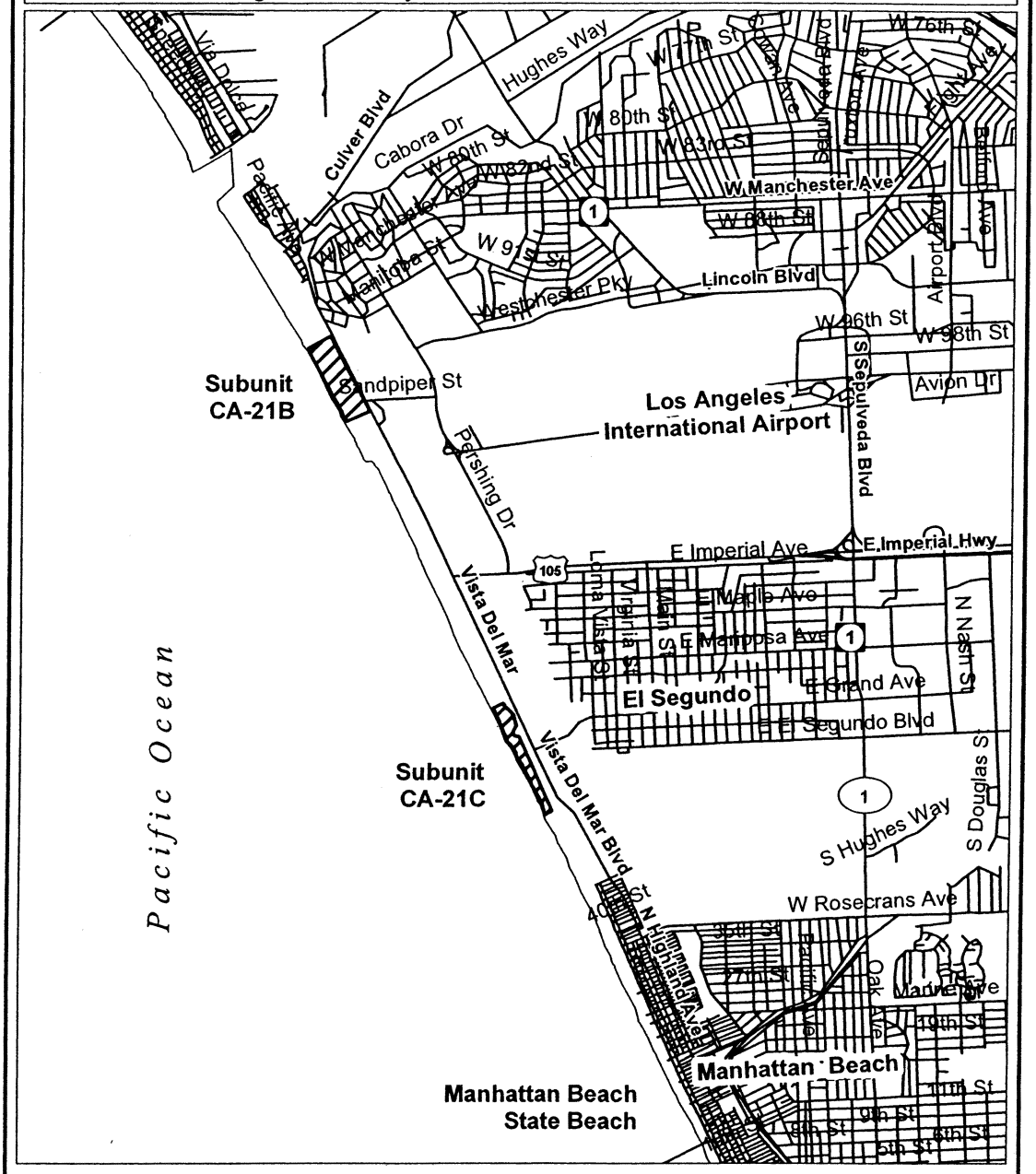
(ii) **Note:** Map of Unit CA 21B (Map M40) follows after description of Unit CA 21C.

(44) Unit CA 21C, Los Angeles County, California.

(i) From USGS 1:24,000 quadrangle map Venice, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 367740, 3753997; 367843, 3754038; 367860, 3754002; 367883, 3753980; 367924, 3753925; 367945, 3753827; 367911, 3753766; 367924, 3753739; 367968, 3753730; 368021, 3753592; 368235, 3753042; 368173, 3753011; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 367740, 3753997.

(ii) **Note:** Map of Units CA 21B and CA 21C (Map M40) follows:

**Map 40.** Dockweiler, North (CA-21B) and Dockweiler, South (CA-21C), Los Angeles County, California.

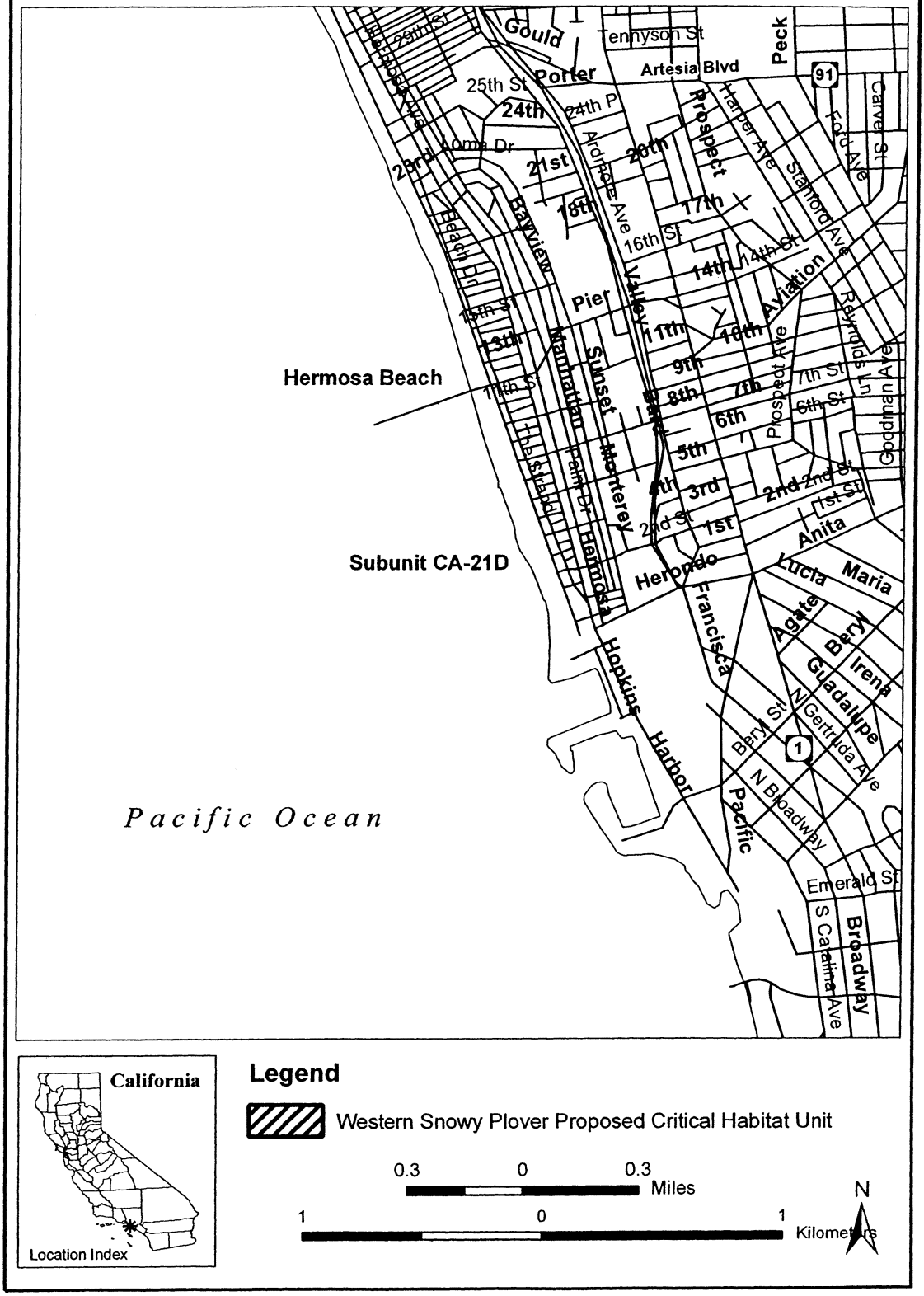


(45) Unit CA 21D, Los Angeles County, California.

(i) From USGS 1:24,000 quadrangle map Redondo Beach OE S, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 370468, 3747024; 370560, 3747050; 370594, 3746936; 370696, 3746667; 370602, 3746644; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 370468, 3747024.

(ii) **Note:** Map of Unit CA 21D (Map M41) follows:

**Map 41.** Hermosa Beach (CA-21D), Los Angeles County, California.



(46) Unit CA 22A, Orange County, California.

(i) From USGS 1:24,000 quadrangle map Seal Beach, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 403074, 3728680; 403074, 3728681; 403267, 3728834; 403265, 3728996; 403238, 3729044; 403290, 3729077; 403342, 3729164; 403545, 3729348; 403571, 3729356; 403635, 3729419; 404409, 3729117; 404407, 3728750; 404398, 3728717; 404399, 3728532; 404464, 3728525; 404727, 3728380; 404729, 3728299; 405337, 3727975; 405370, 3727979; 405369, 3727845; 405358, 3727807; 405339, 3727778; 405295, 3727725; 405113, 3727543; 405081, 3727505; 405050, 3727457; 405006, 3727428; 404907, 3727378; 404859, 3727355; 404833, 3727349; 404801, 3727356; 404766, 3727373; 404712, 3727387; 404584, 3727405; 404557, 3727413; 404529, 3727431; 404495, 3727462; 404465, 3727486; 404426, 3727492; 404372, 3727479; 404183, 3727422; 403756, 3727974; 403749, 3727975; 403740, 3727969; 403720, 3727949; 403709, 3727950; 403697, 3727958; 403684, 3727961; 403653, 3727943; returning to 403074, 3728680.

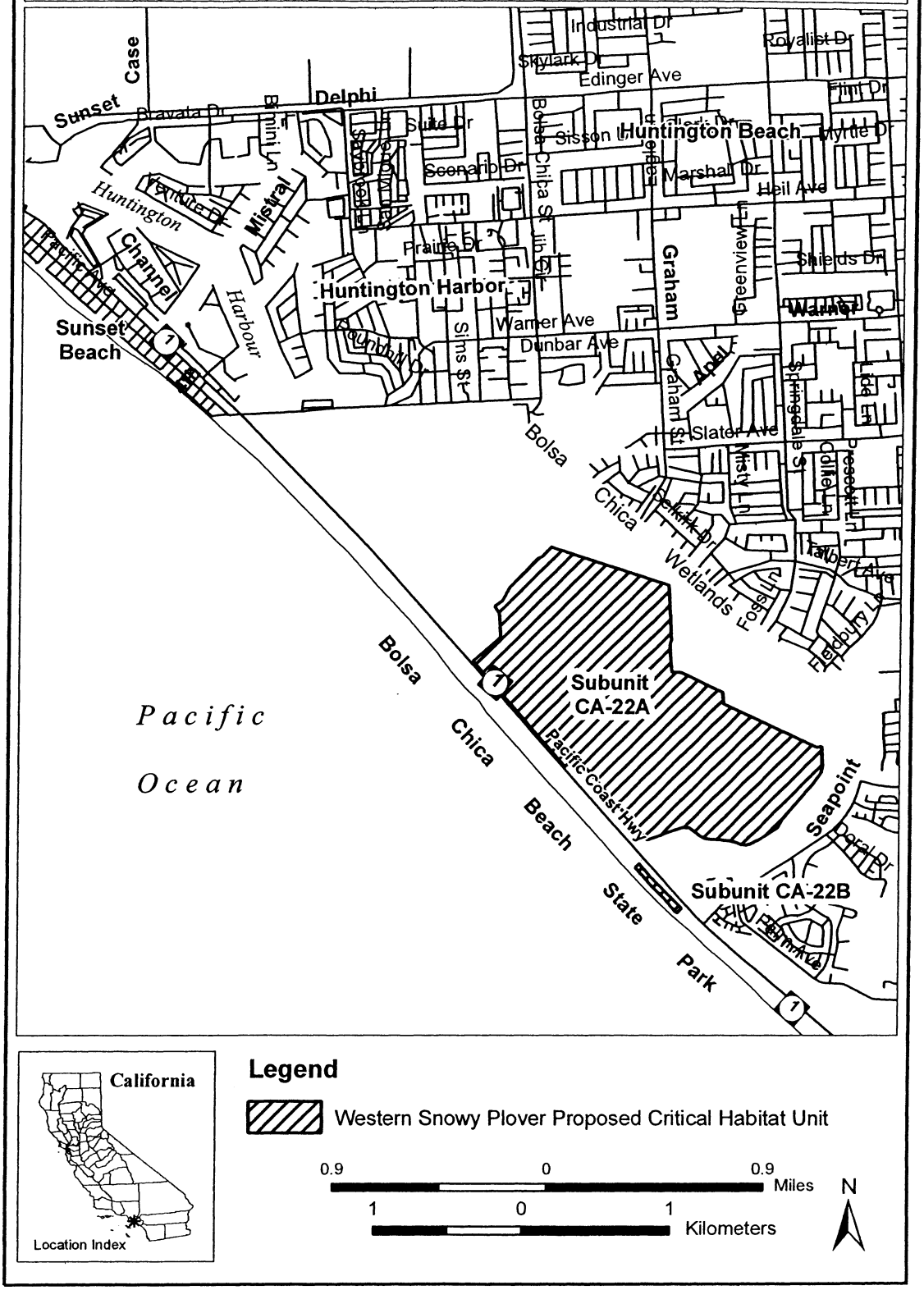
(ii) **Note:** Map of Unit CA 22A (Map M42) follows after description of Unit CA 22B.

(47) Unit CA 22B, Orange County, California.

(i) From USGS 1:24,000 quadrangle map Seal Beach, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 404089, 3727241; 404122, 3727265; 404183, 3727186; 404256, 3727101; 404389, 3726951; 404360, 3726921; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 404089, 3727241.

(ii) **Note:** Map of Units CA 22A and CA 22B (Map M42) follows:

**Map 42.** Bolsa Chica Reserve (CA-22A) and Bolsa Chica St. Beach (CA-22B), Orange County, California.

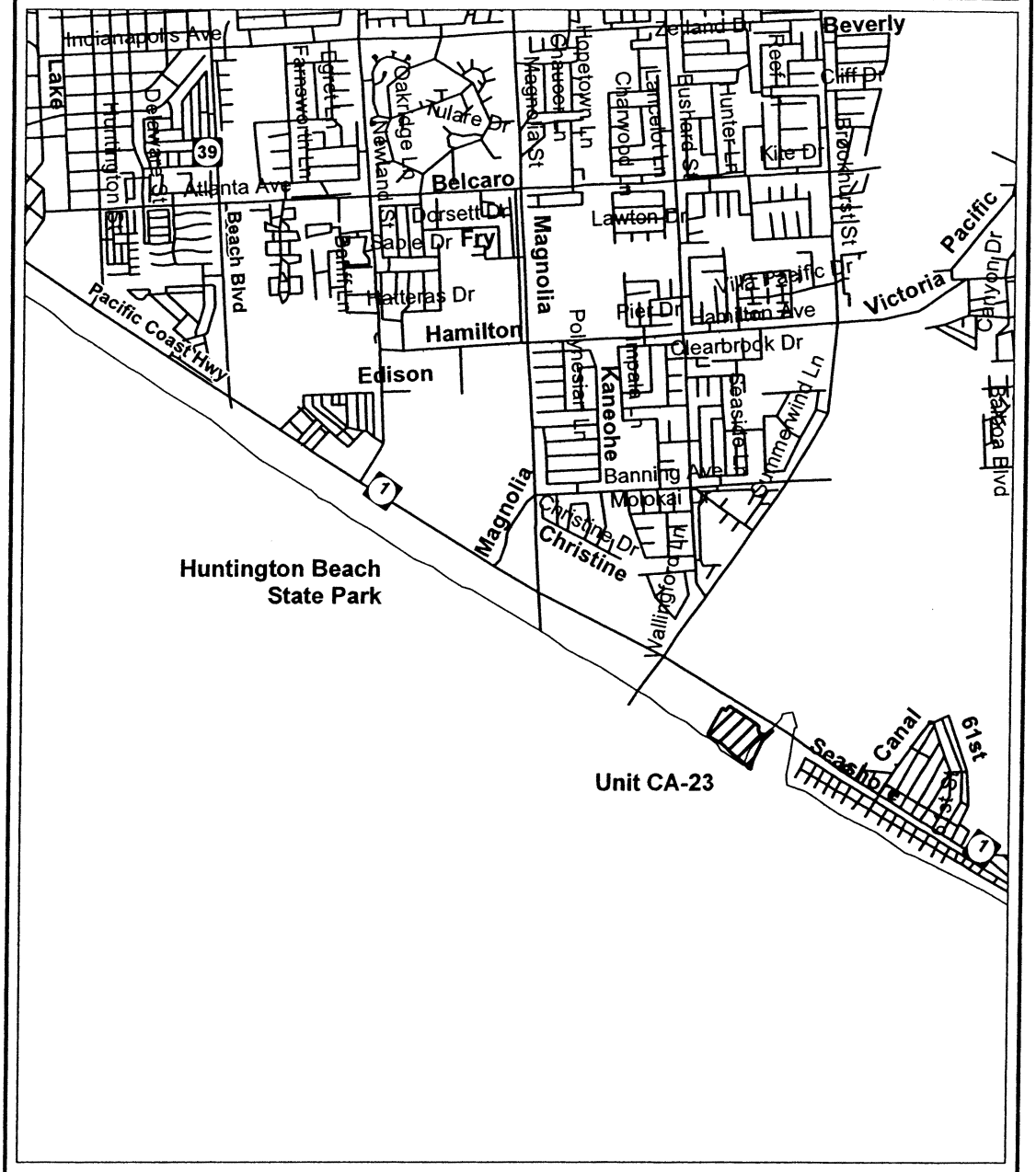


(48) Unit CA 23, Orange County, California.

(i) From USGS 1:24,000 quadrangle map Newport Beach, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 411152, 3721501; 411152, 3721498; 411154, 3721486; 411161, 3721477; 411171, 3721472; 411183, 3721471; 411189, 3721473; 411197, 3721476; 411208, 3721485; 411217, 3721493; 411224, 3721488; 411220, 3721483; 411201, 3721465; 411198, 3721462; 411173, 3721438; 411154, 3721408; 411133, 3721368; 411117, 3721336; 411106, 3721293; 411094, 3721298; 411074, 3721321; 411069, 3721327; 411061, 3721335; 411054, 3721344; 411043, 3721354; 411039, 3721358; 411018, 3721375; 411000, 3721392; 410981, 3721413; 410958, 3721437; 410939, 3721452; 410903, 3721473; 410888, 3721489; 410971, 3721619; 410978, 3721616; 410989, 3721606; 410997, 3721617; 411008, 3721631; 411140, 3721534; 411157, 3721515; returning to 411152, 3721501.

(ii) **Note:** Map of Unit CA 23 (Map M43) follows:

**Map 43.** Santa Ana River Mouth (CA-23), Orange County, California.





**Legend**

Western Snowy Plover Proposed Critical Habitat Unit

0.4 0 0.4 Miles

1 0 1 Kilometers

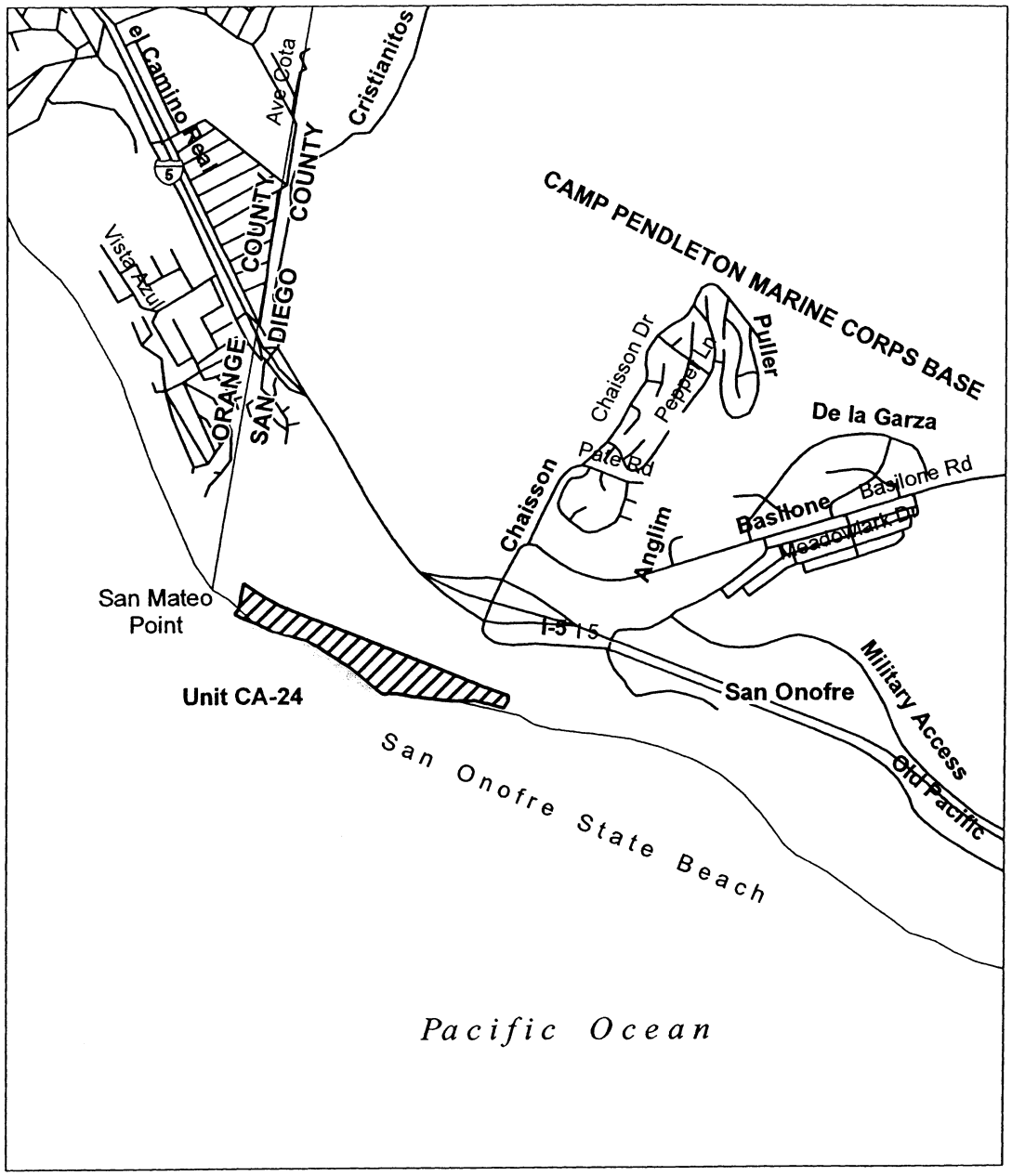
N

(49) Unit CA 24, Orange County and San Diego County, California.

(i) From USGS 1:24,000 quadrangle map San Clemente, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 444728, 3694059; 444754, 3694175; 444782, 3694151; 444839, 3694108; 444911, 3694062; 445037, 3694001; 445278, 3693889; 445569, 3693753; 445795, 3693646; 445898, 3693601; 445898, 3693576; 445875, 3693547; 445874, 3693547; 445838, 3693559; 445747, 3693585; 445651, 3693593; 445618, 3693595; 445475, 3693623; 445447, 3693630; 445406, 3693640; 445385, 3693640; 445369, 3693641; 445347, 3693640; 445334, 3693645; 445329, 3693650; 445313, 3693664; 445271, 3693702; 445220, 3693751; 445194, 3693775; 445105, 3693840; 445062, 3693872; 445012, 3693898; 444957, 3693919; 444929, 3693926; 444928, 3693926; 444899, 3693930; 444882, 3693937; 444854, 3693959; 444852, 3693960; 444818, 3693980; 444814, 3693982; 444767, 3694004; 444736, 3694020; 444712, 3694035; 444709, 3694040; 444728, 3694059; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 444728, 3694059.

(ii) **Note:** Map of Unit CA 24 (Map M44) follows:

**Map 44.** San Onofre Beach (CA-24), Orange and San Diego County, California.



(50) Unit CA 25A, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map Encinitas, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 470975, 3660809; 470982, 3660811; 471014, 3660802; 471058, 3660765; 471085, 3660733; 471105, 3660704; 471122, 3660645; 471129, 3660592; 471148, 3660540; 471147, 3660511; 471155, 3660493; 471153, 3660485; 471153, 3660485; 471147, 3660482; 471122, 3660510; 471112, 3660507; 471106, 3660501; 471067, 3660464; 471066, 3660464; 471081, 3660447; 471084, 3660437; 471084, 3660417; 471077, 3660393; 471077, 3660378; 471085, 3660361; 471044, 3660341; 471013, 3660349; 471002, 3660338; 470992, 3660306; 470980, 3660296; 470977, 3660316; 470969, 3660338; 470968, 3660341; 470962, 3660360; 470955, 3660391; 470949, 3660420; 470943, 3660453; 470942, 3660456; 470933, 3660489; 470925, 3660522; 470924, 3660525; 470914, 3660562; 470907, 3660588; 470906, 3660597; 470901, 3660624; 470893, 3660651; 470892, 3660654; 470884, 3660676; 470877, 3660694; 470872, 3660706; 470864, 3660726; 470861, 3660740; 470860, 3660742; 470859, 3660754; 470862, 3660764; 470866, 3660765; 470874, 3660770; 470903, 3660785; 470962, 3660804; returning to 470975, 3660809.

(ii) **Note:** Map of Unit CA 25A (Map M45) follows after description of Unit CA 25C.

(51) Unit CA 25B, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map Oceanside, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 472453, 3660939; 472518, 3660920; 472571, 3660894; 472603, 3660856; 472613, 3660817; 472614, 3660776; 472576, 3660736; 472538, 3660692; 472498, 3660666; 472478, 3660670; 472452, 3660693; 472451, 3660695; 472404, 3660732; 472373, 3660751; 472352, 3660760; 472335, 3660762; 472311, 3660758; 472296, 3660748; 472282, 3660746; 472264, 3660752; 472244, 3660769; 472209, 3660804; 472183, 3660843; 472164, 3660882; 472153, 3660903; 472145, 3660929; 472156, 3660952; 472190, 3660981; 472223, 3660990; 472288, 3660980; 472393, 3660956; returning to 472453, 3660939.

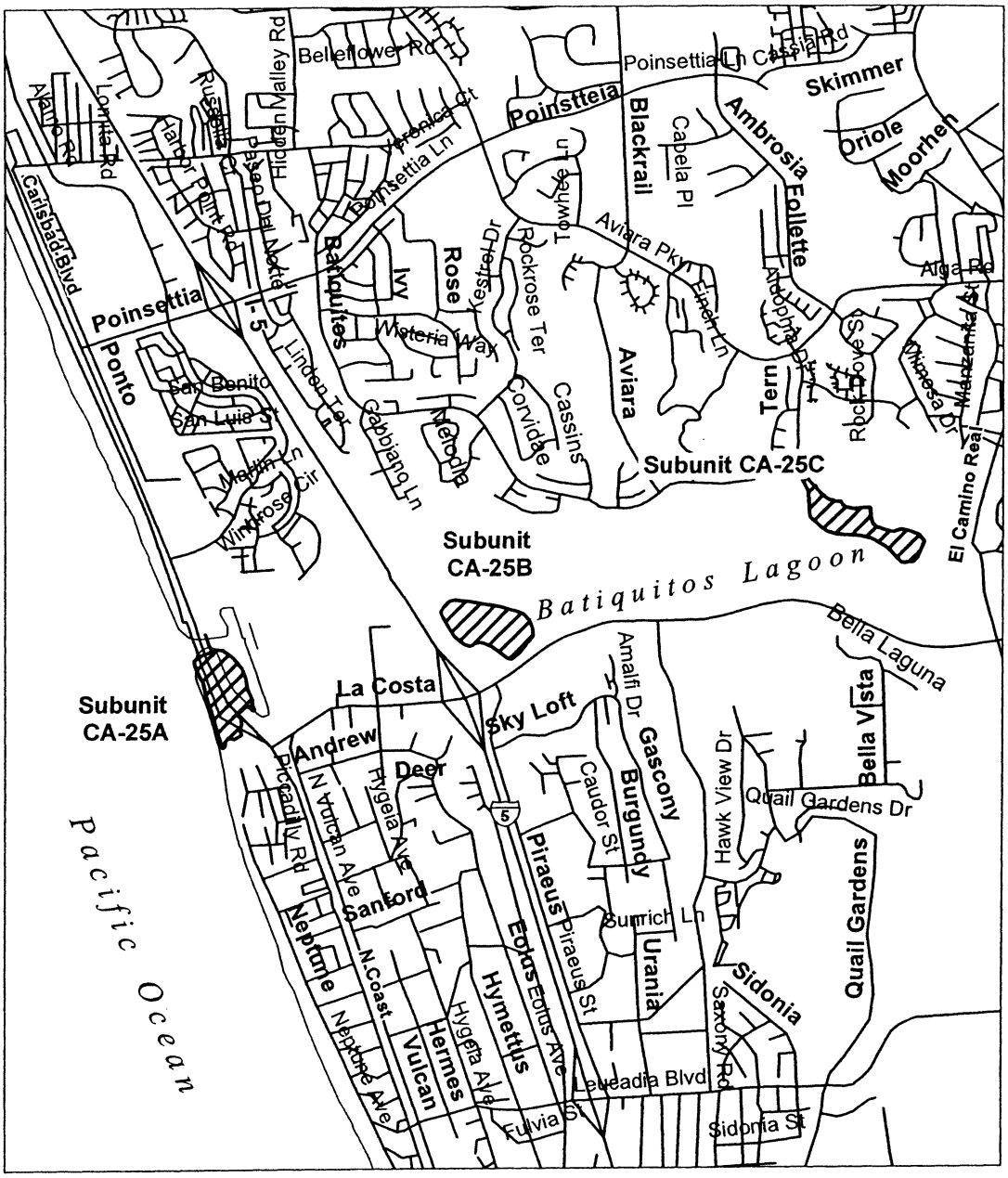
(ii) **Note:** Map of Unit CA 25B (Map M45) follows after description of Unit CA 25C.

(52) Unit CA 25C, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map Oceanside, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 474053, 3661505; 474074, 3661515; 474082, 3661492; 474109, 3661464; 474118, 3661461; 474119, 3661450; 474144, 3661424; 474169, 3661398; 474189, 3661386; 474201, 3661384; 474210, 3661378; 474228, 3661376; 474237, 3661377; 474247, 3661359; 474263, 3661344; 474302, 3661334; 474357, 3661336; 474385, 3661334; 474386, 3661294; 474393, 3661252; 474413, 3661233; 474450, 3661217; 474494, 3661203; 474539, 3661214; 474584, 3661200; 474628, 3661181; 474654, 3661143; 474615, 3661062; 474594, 3661042; 474562, 3661043; 474543, 3661039; 474530, 3661043; 474504, 3661070; 474472, 3661111; 474452, 3661130; 474380, 3661179; 474321, 3661194; 474236, 3661205; 474200, 3661211; 474166, 3661225; 474140, 3661244; 474113, 3661268; 474081, 3661304; 474075, 3661333; 474076, 3661393; 474075, 3661440; 474048, 3661501; returning to 474053, 3661505.

(ii) **Note:** Map of Units CA 25A, CA 25B, and CA 25C (Map M45) follows:

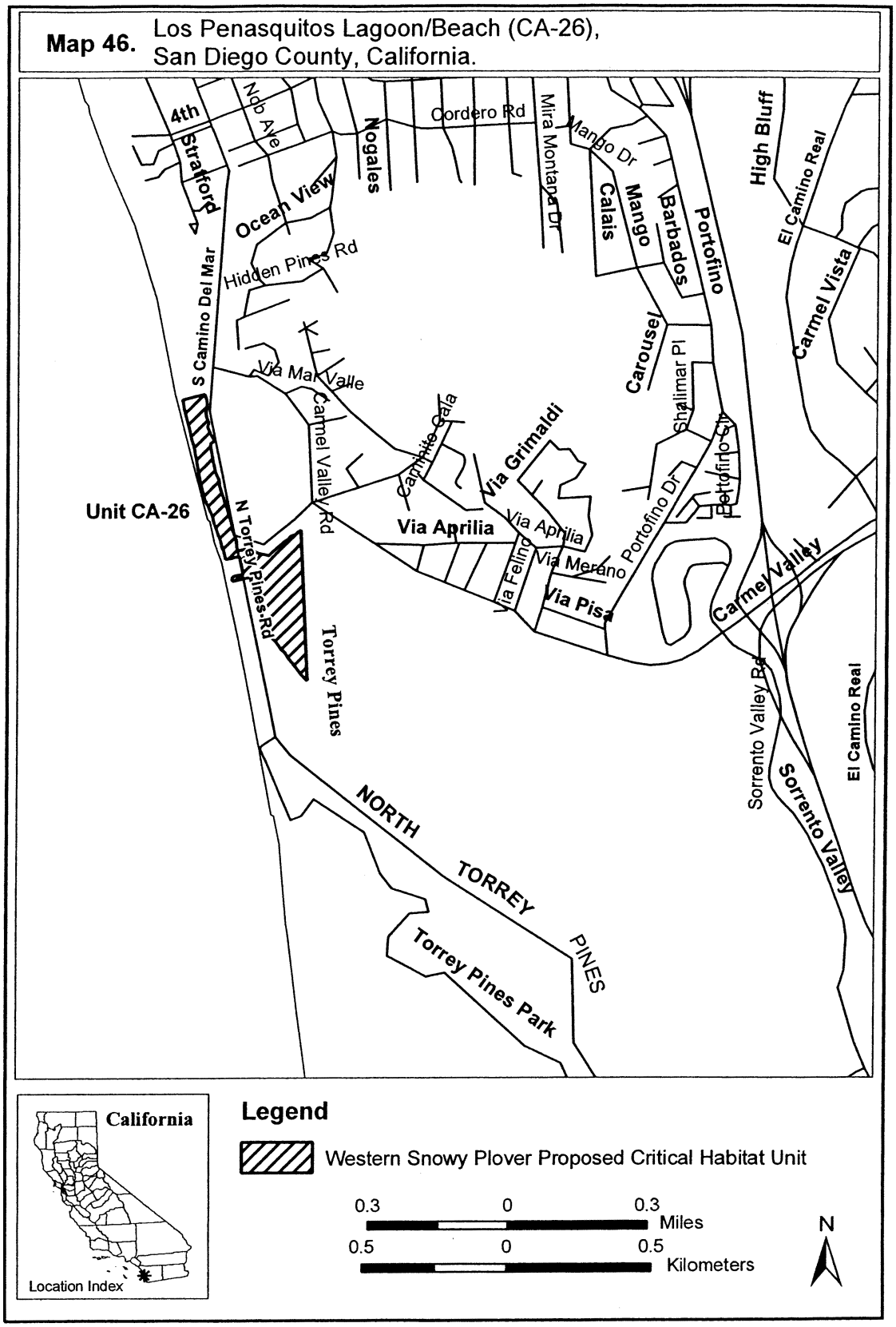
**Map 45.** Batiquitos Lagoon, West (CA-25A), Batiquitos Lagoon, Middle (CA-25B), Batiquitos Lagoon, East (CA-25C), San Diego County, California.



(53) Unit CA 26, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map Del Mar California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 475548, 3644417; 475597, 3644428; 475626, 3644433; 475629, 3644418; 475632, 3644391; 475625, 3644370; 475626, 3644353; 475627, 3644350; 475633, 3644335; 475628, 3644322; 475637, 3644298; 475640, 3644293; 475647, 3644279; 475649, 3644271; 475641, 3644267; 475639, 3644267; 475635, 3644257; 475638, 3644237; 475642, 3644195; 475643, 3644190; 475648, 3644165; 475657, 3644139; 475658, 3644120; 475664, 3644091; 475671, 3644073; 475674, 3644054; 475683, 3644029; 475688, 3644001; 475693, 3643983; 475694, 3643965; 475701, 3643945; 475704, 3643929; 475708, 3643891; 475733, 3643895; 475749, 3643893; 475778, 3643878; 475815, 3643868; 475826, 3643878; 475869, 3643912; 475883, 3643920; 475893, 3643930; 475909, 3643935; 475919, 3643943; 475930, 3643950; 475923, 3643429; 475917, 3643436; 475902, 3643454; 475885, 3643478; 475864, 3643509; 475851, 3643533; 475838, 3643545; 475824, 3643566; 475804, 3643590; 475788, 3643603; 475774, 3643706; 475763, 3643718; 475756, 3643749; 475750, 3643781; 475748, 3643798; 475714, 3643792; 475685, 3643787; 475683, 3643797; 475689, 3643805; 475711, 3643807; 475723, 3643809; 475713, 3643871; 475701, 3643870; 475700, 3643870; 475699, 3643869; 475690, 3643866; 475667, 3643865; 475660, 3643894; 475657, 3643904; 475652, 3643926; 475647, 3643946; 475644, 3643956; 475641, 3643964; 475635, 3643986; 475630, 3644011; 475622, 3644032; 475613, 3644053; 475606, 3644077; 475599, 3644101; 475595, 3644132; 475593, 3644149; 475590, 3644179; 475586, 3644211; 475582, 3644230; 475580, 3644243; 475578, 3644258; 475573, 3644280; 475567, 3644312; 475563, 3644337; 475555, 3644376; 475550, 3644411; returning to 475548, 3644417.

(ii) **Note:** Map of Unit CA 26 (Map M46) follows:

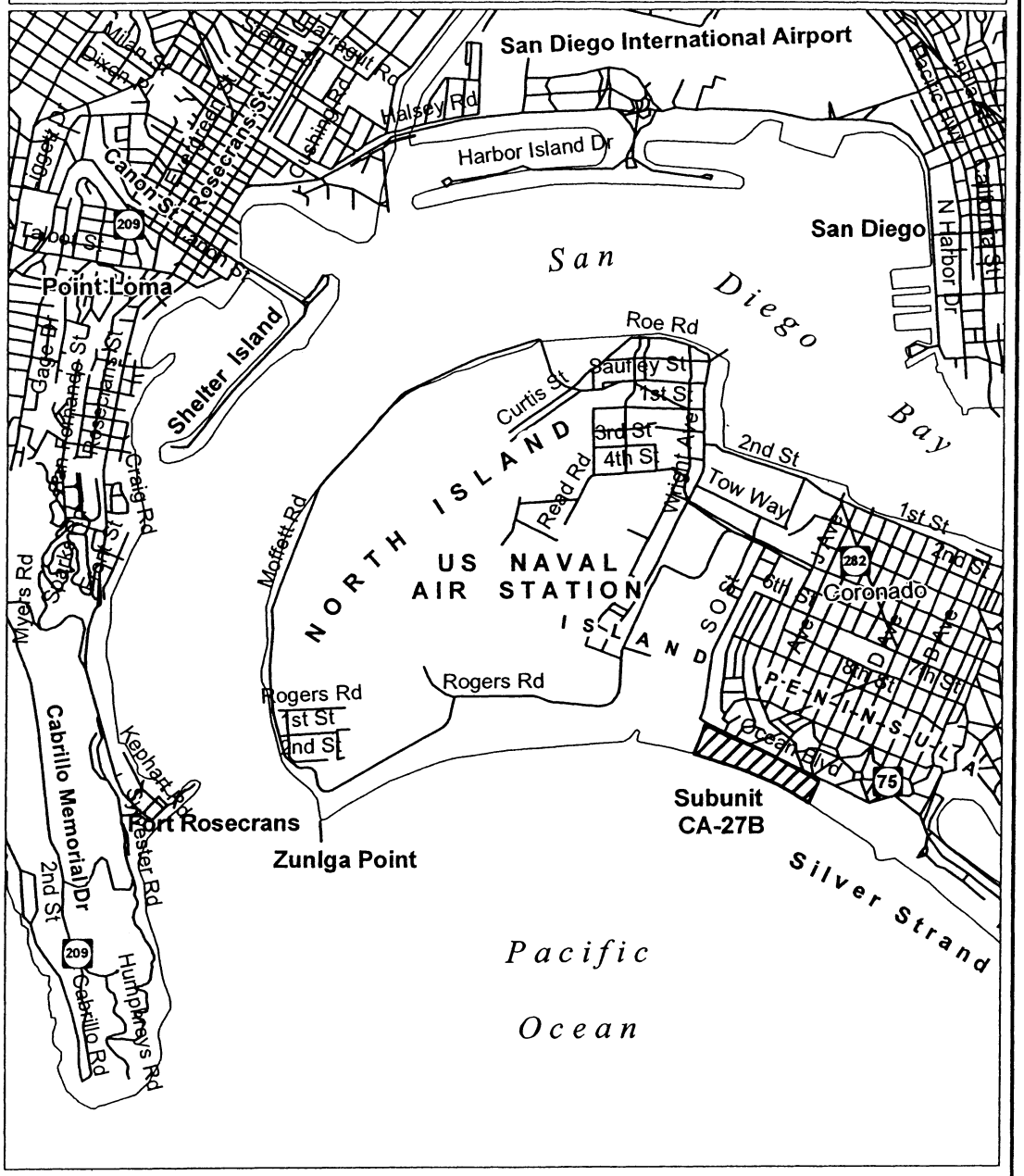

Map 46. Los Penasquitos Lagoon/Beach (CA-26), San Diego County, California.
4th
Nob Ave
Stratford
Nogales
Cordero Rd
Mira Montana Dr
Mango Dr
Calais
Mango
Barbados
Portofino
High Bluff
El Camino Real
Ocean View
Hidden Pines Rd
S Camino Del Mar
Carmel Vista
Carousel
Shalimar Pl
Via Mar Valle
Carmel Valley Rd
Camphire Cala
Via Grimaldi
Portofino Cir
Portofino Dr
Unit CA-26
N Torrey Pines Rd
Via Aprilia
Via Felino
Via Merano
Via Pisa
Carmel Valley
Torrey Pines
Sorrento Valley Rd
Sorrento Valley
El Camino Real
NORTH TORREY PINES
Torrey Pines Park
California
Location Index
Legend
Western Snowy Plover Proposed Critical Habitat Unit
0.3 0 0.3 Miles
0.5 0 0.5 Kilometers
N

(54) Unit CA 27B, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map Point Loma, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 481501, 3616480; 481510, 3616481; 481524, 3616453; 481540, 3616447; 481565, 3616444; 481580, 3616449; 481601, 3616462; 481613, 3616490; 481630, 3616491; 481669, 3616488; 481690, 3616481; 481734, 3616460; 481794, 3616435; 481826, 3616413; 481836, 3616401; 481893, 3616389; 481928, 3616379; 481996, 3616538; 481998, 3616537; 482008, 3616531; 482011, 3616518; 482024, 3616510; 482038, 3616511; 482160, 3616439; 482347, 3616345; 482534, 3616238; 482693, 3616137; 482984, 3615950; 483137, 3615853; 483030, 3615679; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 481501, 3616480.

(ii) **Note:** Map of Unit CA 27B (Map M47) follows:

**Map 47.** North Island, South (CA-27B), San Diego County, California.





**Legend**

Western Snowy Plover Proposed Critical Habitat Unit

0.8 0 0.8 Miles

1 0 1 Kilometers

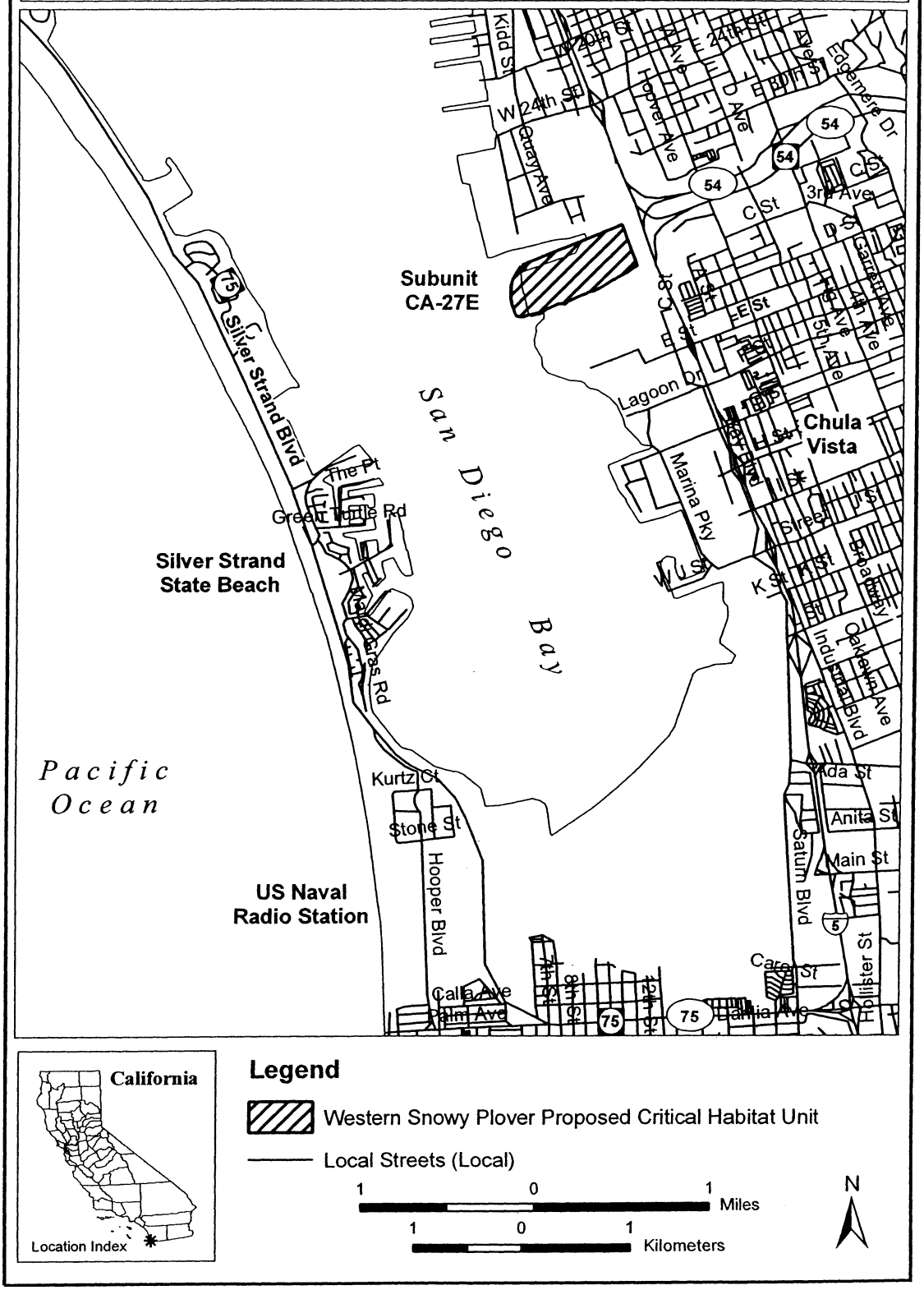
N

(55) Unit CA 27E, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map National City, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 490217, 3611878; 490174, 3611856; 490047, 3611789; 490028, 3611784; 489947, 3611738; 489878, 3611704; 489865, 3611701; 489834, 3611692; 489806, 3611682; 489792, 3611676; 489727, 3611655; 489611, 3611609; 489580, 3611587; 489555, 3611597; 489521, 3611593; 489412, 3611550; 489384, 3611531; 489366, 3611519; 489331, 3611518; 489282, 3611513; 489259, 3611508; 489253, 3611511; 489253, 3611512; 489237, 3611505; 489229, 3611501; 489208, 3611497; 489161, 3611496; 489138, 3611503; 489122, 3611535; 489097, 3611608; 489093, 3611675; 489094, 3611724; 489101, 3611774; 489123, 3611843; 489166, 3611914; 489200, 3611955; 489201, 3611954; 489200, 3611942; 489199, 3611931; 489204, 3611920; 489210, 3611918; 489219, 3611920; 489228, 3611922; 489240, 3611929; 489246, 3611938; 489245, 3611947; 489237, 3611952; 489225, 3611959; 489219, 3611969; 489220, 3611973; 489501, 3612069; 489791, 3612166; 490070, 3612259; 490144, 3612287; 490269, 3611906; 490231, 3611887; 490217, 3611878; returning to 490217, 3611878.

(ii) **Note:** Map of Unit CA 27E (Map M48) follows:

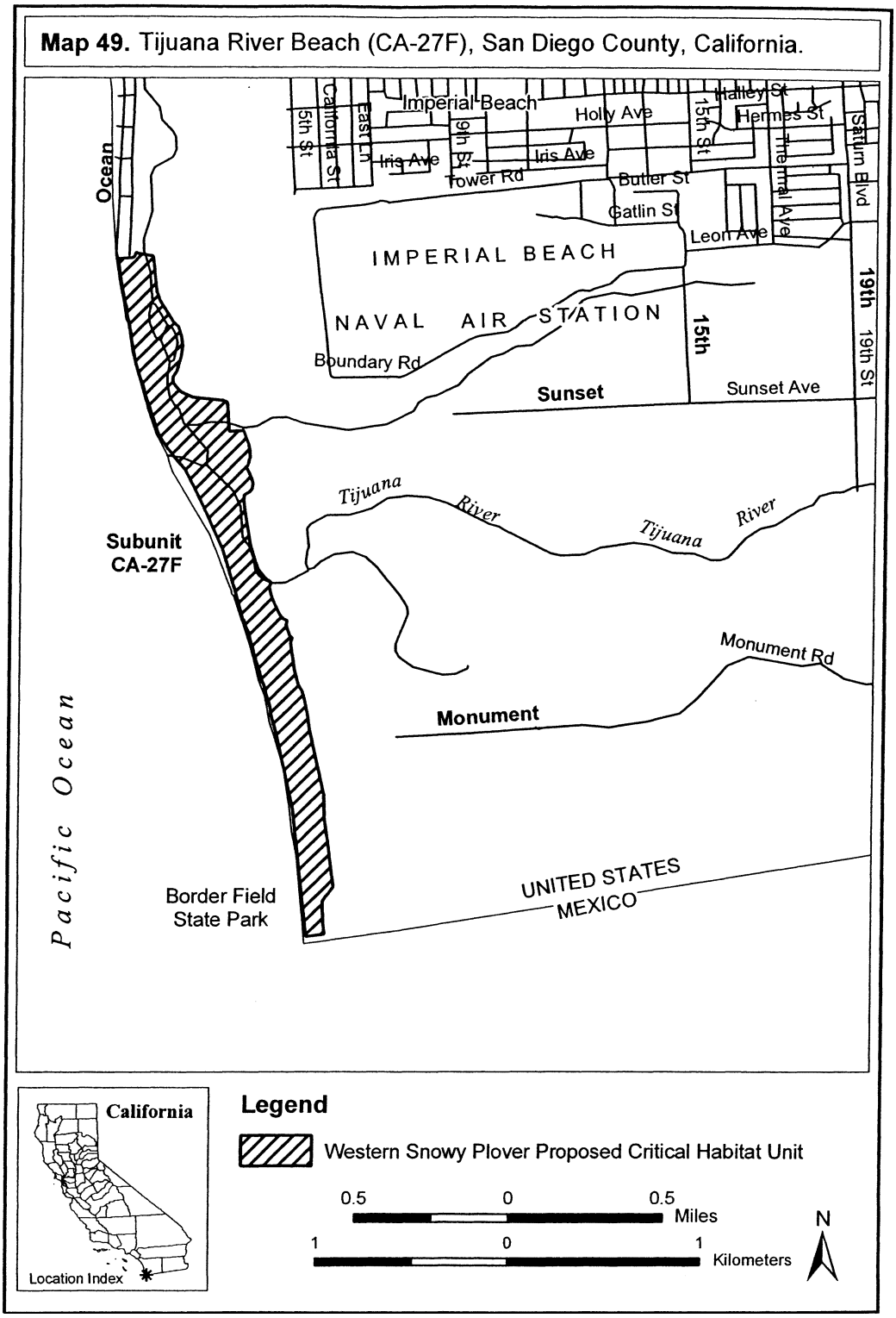
**Map 48.** Sweetwater NWR (CA-27E), San Diego County, California.



(56) Unit CA 27F, San Diego County, California.

(i) From USGS 1:24,000 quadrangle map Imperial Beach, California, land bounded by the following UTM 11 NAD 27 coordinates (E,N): 487747, 3603052; 487774, 3603045; 487775, 3602998; 487776, 3602973; 487782, 3602890; 487784, 3602855; 487795, 3602817; 487852, 3602714; 487855, 3602708; 487857, 3602705; 487884, 3602674; 487895, 3602625; 487900, 3602575; 487888, 3602515; 487865, 3602451; 487840, 3602415; 487840, 3602398; 487845, 3602382; 487865, 3602354; 487885, 3602334; 487935, 3602307; 487986, 3602298; 488089, 3602283; 488115, 3602272; 488115, 3602119; 488115, 3602119; 488163, 3602119; 488176, 3602119; 488191, 3602119; 488215, 3602040; 488220, 3602021; 488218, 3601977; 488214, 3601966; 488209, 3601953; 488199, 3601928; 488220, 3601871; 488227, 3601841; 488221, 3601817; 488207, 3601802; 488178, 3601790; 488177, 3601766; 488183, 3601680; 488201, 3601524; 488202, 3601514; 488218, 3601458; 488235, 3601397; 488267, 3601352; 488292, 3601337; 488296, 3601328; 488298, 3601324; 488290, 3601310; 488289, 3601309; 488294, 3601262; 488308, 3601227; 488338, 3601155; 488350, 3601139; 488372, 3601126; 488369, 3601108; 488364, 3601102; 488381, 3601046; 488393, 3601035; 488389, 3601016; 488385, 3601005; 488397, 3600864; 488414, 3600789; 488431, 3600753; 488442, 3600707; 488455, 3600623; 488460, 3600571; 488462, 3600541; 488516, 3600211; 488512, 3600098; 488525, 3599982; 488543, 3599731; 488519, 3599700; 488497, 3599679; 488484, 3599658; 488481, 3599607; 488479, 3599545; 488485, 3599487; 488391, 3599479; 488355, 3600146; 488284, 3600563; 488270, 3600623; 488268, 3600633; 488266, 3600640; 488262, 3600676; 488255, 3600707; 488246, 3600747; 488237, 3600787; 488226, 3600824; 488215, 3600867; 488203, 3600907; 488196, 3600938; 488192, 3600960; 488190, 3600970; 488188, 3600980; 488180, 3601013; 488175, 3601040; 488169, 3601068; 488156, 3601101; 488152, 3601121; 488148, 3601136; 488143, 3601148; 488104, 3601308; 488055, 3601513; 487954, 3601774; 487883, 3601935; 487822, 3602015; 487792, 3602053; 487789, 3602061; 487784, 3602072; 487780, 3602080; 487765, 3602103; 487754, 3602128; 487693, 3602349; 487693, 3602358; 487684, 3602390; 487674, 3602420; 487659, 3602478; 487655, 3602497; 487646, 3602564; 487645, 3602576; 487645, 3602586; 487644, 3602592; 487640, 3602616; 487639, 3602636; 487638, 3602646; 487636, 3602655; 487633, 3602674; 487631, 3602703; 487627, 3602732; 487623, 3602760; 487621, 3602791; 487615, 3602816; 487609, 3602849; 487607, 3602885; 487605, 3602894; 487602, 3602915; 487599, 3602941; 487595, 3602976; 487595, 3602998; 487592, 3603024; 487590, 3603045; 487669, 3603044; 487680, 3603054; 487682, 3603073; 487697, 3603064; 487705, 3603062; 487747, 3603052; proceed generally N following the mean low water mark (defined at the beginning of the section) and returning to 487747, 3603052.

(ii) **Note:** Map of Unit CA 27F (Map M49) follows:




* * * * *

Dated: September 20, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 05–19096 Filed 9–28–05; 8:45 am]

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## FEDERAL REGISTER PAGES AND DATE, SEPTEMBER

51999–52282 ..... 1
52283–52892 ..... 2
52893–53042 ..... 6
53043–53294 ..... 7
53295–53536 ..... 8
53537–53722 ..... 9
53723–53900 ..... 12
53901–54234 ..... 13
54235–54468 ..... 14
54469–54608 ..... 15
54609–54832 ..... 16
54833–55020 ..... 19
55021–55224 ..... 20
55225–55512 ..... 21
55513–55704 ..... 22
55705–56104 ..... 23
56105–56342 ..... 26
56343–56560 ..... 27
56561–56808 ..... 28
56809–57120 ..... 29

## CFR PARTS AFFECTED DURING SEPTEMBER

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

### 3 CFR

**Proclamations:**
7463 (See Notice of September 8, 2005) ..... 54229
7921 ..... 52281
7922 ..... 53719
7923 ..... 53721
7924 ..... 54227
7925 ..... 54233
7926 ..... 54461
7927 ..... 54463
7928 ..... 54465
7929 ..... 54467
7930 ..... 55021
7931 ..... 55505
7932 ..... 55507
7933 ..... 55509
7934 ..... 55511
7935 ..... 56341

**Executive Order:**
13223 (See Notice of September 8, 2005) ..... 54229
13224 (See Notice of September 21, 2005) ..... 55703
13235 (See Notice of September 8, 2005) ..... 54229
13253 (See Notice of September 8, 2005) ..... 54229
13286 (See Notice of September 8, 2005) ..... 54229

**Administrative Orders:**
Memorandum:
Memorandum of September 9, 2005 ..... 55015
Notices:
Notice of September 21, 2005 ..... 55703
Presidential Determinations:
No. 2004–45 of September 10, 2004 (See Presidential Determination No. 2005–35 of September 12, 2005) ..... 54607
No. 2005–36 of September 14, 2005 ..... 56807
No. 2005–33 of August 29, 2005 ..... 55013
No. 2005–34 of September 9, 2005 ..... 55011
No. 2005–35 of September 12, 2005 ..... 54607
No. 2005–36 of September 14, 2005 ..... 56807

### 5 CFR

**Proposed Rules:**
250 ..... 54658

### 7 CFR

2 ..... 55705
97 ..... 54609
371 ..... 55705
500 ..... 55706
762 ..... 56105
905 ..... 54235
916 ..... 56107
917 ..... 56107
920 ..... 56561
922 ..... 54833
946 ..... 53723
948 ..... 55711
966 ..... 53537
985 ..... 55713
993 ..... 54469
1033 ..... 56111
1216 ..... 55225
1405 ..... 52283
1430 ..... 56113

**Proposed Rules:**
56 ..... 56139
57 ..... 56139
205 ..... 54660
271 ..... 55776
273 ..... 55776
275 ..... 55776
277 ..... 55776
319 ..... 55036
925 ..... 56378
944 ..... 56378
987 ..... 53737
1005 ..... 55458
1007 ..... 55458
1435 ..... 53103

### 8 CFR

**Proposed Rules:**
Ch. I ..... 52037

### 9 CFR

310 ..... 53043
318 ..... 53043

**Proposed Rules:**
3 ..... 55308
94 ..... 52158, 55513
381 ..... 53582

### 10 CFR

50 ..... 52893, 56809
72 ..... 55023, 55513
300 ..... 54835

**Proposed Rules:**
1 ..... 52942

**38 CFR**

14.....52015
41.....52248
49.....52248

**39 CFR**

265.....52016

**Proposed Rules:**

20.....54493, 54510

**40 CFR**

49.....54638
51.....53930, 55212
52 .....52919, 52926, 53275, 53304, 53564, 53930, 53935, 53936, 53939, 53941, 54267, 54639, 54840, 54842, 55212, 55541, 55545, 55550, 55559, 55663, 56129, 56374, 56566
60.....55568
62.....53567, 56853
81 .....52926, 55541, 55545, 55550, 55559, 56129
124.....53420
174.....55254
180 .....53944, 54275, 54281, 54640, 55260, 55263, 55269, 55272, 55277, 55282, 55286, 55293, 55731, 55733, 55740, 55748, 55752, 55761, 56569
228.....53729, 55770
260.....53420
261.....53420
267.....53420
270.....53420
271.....56132
300 .....52018, 54286, 55296, 55774, 55775
310.....56576

**Proposed Rules:**

26.....53838
52 .....52956, 52960, 53329, 53605, 53746, 53974, 53975, 54324, 55062, 55610, 55611, 55613, 56612
62.....53615, 56880
81 .....52960, 53605, 53746, 55610, 55611, 55613
82.....55480
136.....52485
180.....55326
197.....54325, 56418
271.....56150, 56419
272.....56419
300.....54327, 55329
372.....53752

**41 CFR**

301–10.....54481

**42 CFR**

403.....52019
414.....52930
422.....52023

**Proposed Rules:**

405.....52056
410.....52056
411.....52056
413.....52056
414.....52056
426.....52056
447.....55812
455.....55812

**43 CFR**

3100.....53072
3834.....52028

**Proposed Rules:**

423.....54214
429.....54214

**44 CFR**

64 .....52935, 54481, 54844
65 .....52936, 52938, 55028, 55029
67.....52939, 55031

**Proposed Rules:**

67 .....52961, 52962, 52976, 55071, 55073

**45 CFR**

61.....53953
160.....54293

**Proposed Rules:**

162.....55990

**46 CFR**

296.....55581
531.....56577

**Proposed Rules:**

531.....52345, 53330

**47 CFR**

1.....55300
2.....53074, 55301
15.....56856
23.....56580
25.....53074, 56581
53.....55301
54.....55300
64 .....54294, 54298, 54300, 55302
73 .....53074, 53078, 54301, 56581
74.....56581
76.....53076
79.....56582
90.....53074, 56583
97.....53074

**Proposed Rules:**

Ch. I.....53136
20.....56612
23.....56620
64.....53137
73.....53139, 54334
79.....56150

**48 CFR**

205.....54651
211.....53955
212.....53955
217.....54651
225.....52030
232.....52031
237.....52032
242.....52034
252 .....52030, 52031, 52032, 53716, 53955
1802.....52940
1805.....56856
1852.....52941

**Proposed Rules:**

1.....54878
2.....54878, 56318
10.....56318
12.....56318
16.....56314, 56318
17.....54878
31.....54878
32.....54878, 56314
35.....54878
42.....54878
44.....56318
45.....54878
49.....54878
51.....54878
52 .....54878, 56314, 56318
53.....54878
207.....54693
216.....54694
217.....54695
239.....54697, 54698
252.....54695, 54698
9904.....53977

**49 CFR**

105.....56084
106.....56084
107.....56084
110.....56084
171.....56084
172.....56084
173.....56084
176.....56084
177.....56084
178.....56084
179.....56084
180.....56084
383.....56589
384.....56589
571.....53079, 53569
578.....53308
585.....53101
588.....53569

**Proposed Rules:**

571.....53753, 56425
572.....54889

**50 CFR**

17 .....52310, 52319, 56212, 56970
20 .....54483, 55666, 56028, 56532
32.....54146, 56376
222.....56593
223.....56593
226.....52488, 52630
300.....52324
600.....54652
635.....56595
648 .....53311, 53580, 53969, 54302
660 .....52035, 54851, 55302, 55303
679 .....52325, 52326, 53101, 53312, 53970, 53971, 54656, 55305, 55306, 56138, 56377

**Proposed Rules:**

Ch. I.....54700
17 .....52059, 53139, 53141, 54106, 54335, 54701, 56426, 56434, 56880
92.....55692
224.....56884
600.....53979
622 .....53142, 53979, 54518, 56157
635.....53146, 55814
679.....52060
697.....52346

## REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

## RULES GOING INTO EFFECT SEPTEMBER 29, 2005

**AGRICULTURE DEPARTMENT**
**Agricultural Marketing Service**
Kiwifruit grown in—
California; published 9-28-05
**HEALTH AND HUMAN SERVICES DEPARTMENT**
**Food and Drug Administration**
Food for human consumption:
Food labeling—
Nutrient content claim ''healthy''; sodium levels definition; published 9-29-05
**INTERIOR DEPARTMENT**
**Minerals Management Service**
Outer Continental Shelf; oil, gas, and sulphur operations:
Plans and information; published 8-30-05
Royalty management:
Royalty payment and production reporting requirements; temporary relief for Federal oil and gas leases affected by Hurricanes Katrina and Rita; published 9-29-05
**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**
Acquisition regulations:
Contract awards; public announcements; published 9-29-05
**SECURITIES AND EXCHANGE COMMISSION**
Securities, etc.:
Sarbanes-Oxley Act of 2002; implmentation—
Exchange Act periodic reports; inclusion of management's report on internal control over financial reporting and certfication disclosure; published 9-29-05
**SMALL BUSINESS ADMINISTRATION**
Very Small Business Program; applicable regulations removed; published 9-29-05
**TRANSPORTATION DEPARTMENT**
**Federal Aviation Administration**
Airworthiness directives:
Aerospatiale; published 9-14-05
Airbus; published 9-14-05
Pilatus Aircraft Ltd.; published 8-15-05
Class E airspace; published 3-14-05

## COMMENTS DUE NEXT WEEK

**AGENCY FOR INTERNATIONAL DEVELOPMENT**
Assistance awards to U.S. non-Governmental organizations; marking requirements; Open for comments until further notice; published 8-26-05 [FR 05-16698]
**AGRICULTURE DEPARTMENT**
**Agricultural Marketing Service**
Cotton classing, testing and standards:
Classification services to growers; 2004 user fees; Open for comments until further notice; published 5-28-04 [FR 04-12138]
**AGRICULTURE DEPARTMENT**
**Animal and Plant Health Inspection Service**
Animal welfare:
Ferret standards; humane handling, care, treatment, and transportation; comments due by 10-4-05; published 8-5-05 [FR 05-15516]
Plant-related quarantine, domestic:
Imported fire ants; comments due by 10-7-05; published 8-8-05 [FR 05-15623]
**AGRICULTURE DEPARTMENT**
**Natural Resources Conservation Service**
Reports and guidance documents; availability, etc.:
National Handbook of Conservation Practices; Open for comments until further notice; published 5-9-05 [FR 05-09150]
**AGRICULTURE DEPARTMENT**
**Rural Utilities Service**
Telecommunication policies on specifications, acceptable materials, and standard contract forms; comments due by 10-4-05; published 8-5-05 [FR 05-13945]
**COMMERCE DEPARTMENT**
**National Oceanic and Atmospheric Administration**
Fishery conservation and management:
Alaska; fisheries of Exclusive Economic Zone—
Groundfish; comments due by 10-3-05; published 9-1-05 [FR 05-17454]
Pollock; comments due by 10-6-05; published 9-21-05 [FR 05-18750]
Pollock; comments due by 10-6-05; published 9-21-05 [FR 05-18751]
West Coast States and Western Pacific fisheries—
Salmon; recreational fishery adjustments; comments due by 10-6-05; published 9-21-05 [FR 05-18854]
West Coast salmon; comments due by 10-6-05; published 9-21-05 [FR 05-18853]
**COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA**
Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]
**DEFENSE DEPARTMENT**
Acquisition regulations:
Pilot Mentor-Protege Program; Open for comments until further notice; published 12-15-04 [FR 04-27351]
**EDUCATION DEPARTMENT**
Grants and cooperative agreements; availability, etc.:
Vocational and adult education—
Smaller Learning Communities Program; Open for comments until further notice; published 2-25-05 [FR E5-00767]
**ENERGY DEPARTMENT**
Meetings:
Environmental Management Site-Specific Advisory Board—
Oak Ridge Reservation, TN; Open for comments until further notice; published 11-19-04 [FR 04-25693]
**ENERGY DEPARTMENT**
**Energy Efficiency and Renewable Energy Office**
Commercial and industrial equipment; energy efficiency program:
Test procedures and efficiency standards—
Commercial packaged boilers; Open for comments until further notice; published 10-21-04 [FR 04-17730]
**ENERGY DEPARTMENT**
**Federal Energy Regulatory Commission**
Electric rate and corporate regulation filings:
Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]
Electric utilities (Federal Power Act):
Electric Reliability Organization certification and electric reliability standards establishment, approval, and enforcement procedures; comments due by 10-7-05; published 9-7-05 [FR 05-17752]
**ENVIRONMENTAL PROTECTION AGENCY**
Air pollution; standards of performance for new stationary sources:
Predictive emission monitoring systems; performance specifications; testing and monitoring provisions amendments; comments due by 10-7-05; published 8-8-05 [FR 05-15330]
Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:
Arizona; correction; comments due by 10-6-05; published 9-6-05 [FR 05-17539]
Air quality implementation plans; approval and promulgation; various States:
Oregon; comments due by 10-6-05; published 9-6-05 [FR 05-17537]
Environmental statements; availability, etc.:
Coastal nonpoint pollution control program—
Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]
Pesticides; tolerances in food, animal feeds, and raw agricultural commodities:
Acetic acid; comments due by 10-3-05; published 8-3-05 [FR 05-15148]
Alachlor, etc.; comments due by 10-3-05; published 8-3-05 [FR 05-15335]
C8, C10, and C12 straight-chain fatty acid

## LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with ''PLUS'' (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal-register/laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in ''slip law'' (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

**H.R. 3761/P.L. 109–72**

Flexibility for Displaced Workers Act (Sept. 23, 2005; 119 Stat. 2013)

**H.R. 3768/P.L. 109–73**

Katrina Emergency Tax Relief Act of 2005 (Sept. 23, 2005; 119 Stat. 2016)

**Last List September 23, 2005**

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